

(21,144.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 144.

P. R. EARLING, RECEIVER OF THE BERLIN NATIONAL
BANK, AND THE BERLIN NATIONAL BANK, PLAIN-
TIFFS IN ERROR,

vs.

JOHN EMIGH AND O. L. ATKINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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1 Supreme Court of Wisconsin.

JOHN EMIGH and O. L. ATKINS, Plaintiffs and Respondents,
vs.

P. R. EARLING, Receiver of the Berlin National Bank, and THE
BERLIN NATIONAL BANK, Defendants and Appellants.

*Petition for a Writ of Error to the Supreme Court of the United
States.*

To the Chief Justice of the Supreme Court of Wisconsin:

Your petitioners, P. R. Earling, Receiver of the Berlin National Bank, and the Berlin National Bank, respectfully represent and aver that a final judgment and decree was rendered on the eighteenth day of February, 1908, against your petitioners and in favor of the respondents John Emigh and O. L. Atkins, in this cause by this court, and that said decision is against the claims as hereinafter more particularly specified, by which your petitioners sought to reverse the judgment and decree of the court below; claiming in this court that

Errors Relied Upon.

The Circuit Court erred in its findings and conclusions of law and judgment as follows:

1. The rulings and findings of fact and conclusions of law and the judgment and decree of the Circuit Court of Green Lake county, Wisconsin, holding that the Berlin National Bank, by itself, or by any of its officers, board of directors, or agents, was conducting or operating the Jenne Creamery Company and carrying on the business in which that company was engaged, of separating butter-fat from milk, manufacturing the same into butter, marketing the product and accounting for the proceeds to the patrons who furnished the milk, and ordering P. R. Earling, receiver of the Berlin National Bank, to pay claims of such patrons, creditors of the Jenne Creamery Company, out of the funds in his hands as receiver of the bank, are against the validity of the statutes of and the authority exercised under the United States by, and the title, right, privilege and immunity of and the authority exercised by the receiver of the Berlin National Bank under the United States and the national bank act and the amendments thereto (Revised Statutes of the United States, sections 5133 to 5242 inclusive), in the following particulars, because:

a. Under section 5133 banks cannot be formed for any other object or carry on any other business than that of banking; and under section 5136, could not be organized or become a body corporate, or have power to make contracts, or by its board of directors or duly authorized officers or agents exercise any powers except such incidental powers as shall be necessary to carry on the business of banking; and the court decided in its findings of fact 7, 8, 10, 11,

12, 13, 24, 25, 26, 27, 28, 29, 30, 31, 33 and 34 and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the bank had notice of the arrangement between Brown and the Jenne Creamery Company, and that the same was actually made by the bank to carry on, and that the bank did in fact carry on, the business of the Jenne Creamery Company, and that the bank officers, directors and agents could bind the bank in that matter.

b. Under section 5134, the bank must state in its organization certificate the place where its operations of discount or deposit are to be carried on, and particularly the county and state and town or village, and cannot carry on operations in any other place; and under section 5190 the established business of the bank is required to be transacted in an office or banking house, located in the place specified in its organization certificate; and the court decided in its findings of fact 12, 13, 30 and 33, and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the bank could carry on business in other places than in its banking house, located in the City of Berlin.

c. Under section 5137 the bank could hold real estate for no other purpose than that necessary for its immediate accommodation in the transaction of its business, or mortgaged by way of security for debts, previously contracted or conveyed in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales under judgments, decrees or mortgages held by the bank, or purchased to secure debts due to it; and the court decided in its findings of fact 7, 8, 10, 11, 12, 13, 24, 25, 26, 27, 28, 29, 30, 31, 33, and 34, and other findings of fact and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the bank did hold the real estate of the Jenne Creamery Company and the five leased creameries, none of which was acquired by the bank in the mode or for the purpose authorized by the bank act.

d. Under section 5134 the affairs of the bank are required to be managed by not less than five directors; and the court decided in its findings of fact 6, 8, 10, 11, 29, 30, 31, 32, 33 and 34, and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the affairs of the bank could be managed by less than five directors.

e. Under section 5236 the comptroller of the currency is required to make a ratable dividend of the money paid over by the receiver of the bank on all established claims; and under section 5242 all transfers of deposits and of money for the use of its creditors after the commission of an act of insolvency with a view to prevent the application of the bank's assets in the manner prescribed by the bank act, or with a view to the preference of one creditor to another, shall be utterly null and void; and the court decided in its findings of

fact 12, 13, 14, 24, 25, 29, 34 and 35, and other findings and
3 in its conclusions of law 1 to 7 inclusive, and in its judgment, that certain funds collected by the bank upon checks and drafts to the order of the Jenne Creamery Company in payment for sales of butter and deposited in the bank for collection are trust funds and should be paid in full as prior claims over all the general

and unsecured creditors of the bank, and certain others should be entitled to participate in dividends, and that the costs should be paid out of the funds of the bank.

And your petitioners pray that a writ of error be allowed to the Supreme Court of the United States to review the decision of this court and that the enforcement of the judgment herein be stayed upon the execution and approval of a proper bond until the final determination of said writ of error.

P. R. EARLING,

Receiver of Berlin National Bank, and

THE BERLIN NATIONAL BANK,

Petitioners,

By SIMMONS, MITCHELL & IRVING,

Counsel for Petitioners.

The writ of error above prayed for is hereby allowed. Let the plaintiff in Error give an undertaking in the sum of three thousand dollars to be approved by me and upon the filing of such undertaking let proceedings be stayed in this Court.

JNO. B. WINSLOW,

Chief Justice Sup. Ct. Wis.

March 13th, 1908.

4 [Endorsed:] 228. Supreme Court of Wisconsin. John Emigh and O. L. Atkins, Plff's and Resp'ts, vs. P. R. Earling, Receiver of the Berlin National Bank, and the Berlin National Bank, Def'ts and App'ls. Petition for a Writ of Error. (Copy.) Filed March 13, 1908. Clarence Kellogg, Clerk of Supreme Court, Wis. Simmons, Mitchell & Irving, Attorneys for Petitioners.

5 *Writ of Error.*

UNITED STATES OF AMERICA, vs.:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Wisconsin before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between P. R. Earling, receiver of The Berlin National Bank, and The Berlin National Bank, plaintiffs in error, and John Emigh and O. L. Atkins, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of such their validity; or wherein a title, right, privilege, or immunity was claimed under the constitution or any treaty or statute of or commission held or authority

exercised under the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed under such constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said P. R. Earling, receiver of The Berlin National Bank, and The Berlin National Bank, plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment or decree be therein given,

6 that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 30th day of April next in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 31st day of March, in the year of our Lord one thousand nine hundred and eight.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,

*Clerk of the Circuit Court of the United States
for the Western District of Wisconsin.
By F. D. REED, Deputy.*

Allowed by

JNO. B. WINSLOW,

*Chief Justice of the Supreme Court
of the State of Wisconsin.*

7 [Endorsed:] Supreme Court of the State of Wisconsin. P. R. Earling, Receiver of The Berlin National Bank, and The Berlin National Bank, Plaintiffs and Respondents, vs. John Emigh and O. L. Atkins, Defendants and Appellants. Writ of Error. Filed Mar. 31, 1908. Clarence Kellogg, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

Citation.

UNITED STATES OF AMERICA, 32:

To John Emigh and O. L. Atkins, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Wisconsin, wherein P. R. Earling, receiver of the Berlin National Bank, and The Berlin National Bank are plaintiffs in error and you are defendants in error, to show cause if any there be why the judgment and decree rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Wisconsin, this 31st day of March, A. D. 1908.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court
of the State of Wisconsin.

[Seal Supreme Court of Wisconsin.]

Attest:

CLARENCE KELLOGG, Clerk.

OAKCROSS, WISCONSIN, March 31st, 1908.

We E. F. Kileen and J. C. Thompson, attorneys of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation.

E. F. KILEEN AND
J. C. THOMPSON.

Attorney for John Emigh and O. L. Atkins.

9-13 [Endorsed:] Supreme Court of the State of Wisconsin. P. R. Earling, Receiver of The Berlin National Bank, and The Berlin National Bank, Plaintiffs and Respondents, vs. John Emigh and O. L. Atkins, Defendants and Appellants. Citation. Filed Mar. 31, 1908. Clarence Kellogg, Clerk of Supreme Court, Wis.

* * * * *

14-22 Pleas before the Supreme Court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, the seventh day, of January, A. D. 1908.

Present: John B. Winslow, Chief Justice; Roujet D. Marshall, Joshua Eric Dodge, Robert G. Siebecker, James C. Kerwin, William H. Timlin, Robert Bashford, Justices; Clarence Kellogg, Clerk.

Be It Remembered that heretofore, to-wit: On the twenty-seventh day of November, in the year of our Lord one thousand nine hundred

and six, came into the office of the Clerk of the Supreme Court of the State of Wisconsin, P. R. Earling as receiver of the Berlin National Bank, and the Berlin National Bank, and filed in said court their certain notice of appeal and undertaking on appeal, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Green Lake county, in said state, in the words and figures following, that is to say:

* * * * *

23

Complaint.

In Circuit Court, Green Lake County.

JOHN EMIGH and O. L. ATKINS, Plaintiffs,

vs.

P. R. EARLING, as Receiver of the Berlin National Bank; THE BERLIN National Bank, The Jenne Creamery Company, and John W. Brown, Defendants.

Place of Trial, Green Lake County.

And now come the above named plaintiffs by E. F. Kileen, their attorney, and for a cause of action against the above named defendants, allege and say:

1.

That ever since the 13th day of March, 1902, the defendant, the Jenne Creamery Company, has been and now is a corporation organized and existing under the laws of the state of Wisconsin, and having its principal place of business at the city of Berlin, in the county of Green Lake, in said state.

2.

That at all times hereinafter mentioned the defendant, the Berlin National Bank was, for a long time prior thereto had been and still is a national banking corporation organized and incorporated under the laws of the United States of America, and until its closing as hereinafter set out doing a banking business as a national bank at the city of Berlin, Green Lake county, in the state of Wisconsin.

3.

That on or about the 1st day of October, 1902, one, D. J. Jenne and E. H. Jenne were the owners of the bulk of the capital
24 stock of the Jenne Creamery Company, and that they individually and as co-partners doing business under the firm name and style of D. J. Jenne & Company were largely indebted to the Berlin National Bank, and also indebted to other parties, and individually and as a firm were insolvent, and the defendant, Jenne Creamery Company, was also largely indebted to said bank and to other parties and was then and there insolvent and that on or about said 1st day of October A. D. 1902, the said D. J. Jenne and E. H. Jenne entered into an arrangement with the Berlin National Bank

and its officers and directors whereby and whereunder the said D. J. Jenne and E. H. Jenne were to assign and turn over and have assigned and turned over and conveyed to one, John W. Brown, then, ever since and now the cashier of said Berlin National Bank, practically all of their property except such as was exempt by law from seizure and sale on execution; that said property was to be held by said cashier of the Berlin National Bank in trust for the creditors; and said capital stock of said creamery company was to be held by him and other officers and directors of said bank and that the sole management, control, operation and title of all said company's business and property was to be in the hands of and conducted by said bank through its said officers and agents and directors as plaintiffs are informed and believe and it was agreed that the operation and business of said creamery company should, in such form as might be determined upon, be continued and thereafter said capital stock of said creamery company was assigned to the said cashier and to one Foster the president of said bank, and to one Steadman the assistant cashier thereof, and they became and were the stockholders of the Jenne Creamery Company under said arrangement, and were made the directors and officers thereof as well. And it was further

25 agreed that out of the proceeds or profits of the operation of the creamery company payments were to be made to the creditors of said D. J. and E. H. Jenne including said bank and to the creditors of the Jenne Creamery Company including said bank the costs and expenses incurred in running said business to be first paid, and any remainder of the property after the payment of said debts should be returned to the said Jennes, their executors, heirs or administrators.

That the said Brown, Steadman and Foster aside from their interest in the Berlin National Bank as stockholders, directors and officers thereof, had no interest in the Jenne Creamery Company and were to receive nothing for their services, and that the control and operation of the said Jenne Creamery Company's business was placed in their hands because of their connection with and their relations to the Berlin National Bank, and the same was done with the knowledge and consent of said bank and for its benefit, and its affairs thereafter were in reality as plaintiffs are informed and believe, managed, run and conducted by the Berlin National Bank acting through its officers and directors who thereafter constituted and were all of the stockholders, directors and officers of the Jenne Creamery Company and for and in the interest of said bank and said bank became and was and is a party thereto and a participant therein and bound thereby and responsible therefor.

That the business there-for carried on by the Jenne Creamery Company and thereafter carried on in its name under said arrangement consisted in the making of butter and other dairy products from milk furnished to it by dairymen in different parts of Green Lake, Waushara and Marquette counties, and that the Jenne Creamery Company entered into agreements with the Marion and Mt. Morris Butter & Cheese Company, and the Terrill Dairymen's Association, and the Spring Lake Butter & Cheese Company, and the

Black Creek Dairy Association, and the Seneca Cheese factory and others being different creamery companies in the said counties, whereby they leased from them their creamery buildings and
26 fittings and apparatus, and agreed to pay therefor certain valuable considerations and the said Jenne Creamery Company, for value, therein agreed to operate said creameries as a factory or skimming station during each year, and it was for value expressly agreed by the Jenne Creamery Company that it would make the butter for the patrons of such factories for $3\frac{1}{2}$ cents per pound when butter should sell for 17 cents or over, and 3 cents per pound when it should sell for less than 17 cents, and that it should bear all expenses.

That such provision in said agreement was made for the benefit of the patrons of said creamery companies, and that thereafter the Jenne Creamery Company entered into arrangements with the patrons of said creamery companies, in accordance with said agreement wherein and whereby they agreed to take the milk of said patrons and to determine the amount of butter fat or butter producing substance therein, and to make the same into butter in a good and workmanlike manner, and to sell the same, and after deducting $3\frac{1}{2}$ cents per pound when butter sold for over 17 cents, and 3 cents per pound when butter sold for less than 17 cents per pound for making, selling, handling and collecting therefor, to pay the remainder of the proceeds thereof to their said patrons severally, and that in determining the amount of the proceeds to which each person was entitled, they were to divide the total proceeds from the sales of butter for each month by the number of pounds of butter fat contained in the milk furnished by their patrons during such time, and the average price so ascertained was to be used in determining the portion of the proceeds of the sale of said butter belonging to each patron individually, and such proceeds were thereupon to be turned over to said several patrons as soon as said computation could be made.

That under said arrangement, said Jenne Creamery Company did not buy, purchase or become the owner of the said milk or
27-40 the products thereof, to-wit: The said butter fat and butter, but that it merely handled the same for the said patrons of said different creamery companies who became its patrons in the sense that they employed it for so much a pound to make, the butter and handle, sell and collect and divide the proceeds thereof between the said patrons.

And that the said patrons who severally furnished the said milk were at all times the owners, beneficially, equitably and legally of the same, and of the products thereof and of the proceeds derived from the sale of said products.

5.

That during the month of October, 1904, one M. Lungwitz, delivered to the Jenne Creamery Company at the Terrill Dairymen's Association creamery, 2278 pounds of milk containing 107 pounds of butter fat:

Name.	Creamery.	Lbs. milk.	Lbs. butter fat.
F. Georgeson,	Terrill.....	3,372	121.3
Hans Rasmussen	"	408	16.5
J. W. Briggs	"	1,353	56.1
Fay Waite	"	1,242	55.8
H. Lamue	"	205	8.7
A. Terrill	"	1,654	76.
L. Taylor	"	1,881	70.8
A. Cluey	"	2,679	123.2
H. Tice	"	2,145	100.8
M. Carpenter	"	2,123	91.2
A. Rivers	"	2,237	98.4
L. W. Chipman	"	5,220	211.4
Otto Lungwitz	"	4,203	203.8
A. Morson	"	2,963	136.2
M. Percy	"	1,530	68.8
Geo. Tice	"	1,353	63.5
S. Ware	"	1,158	44.
Chas. Brigham	"	668	27.
John Roberts	"	1,746	69.8
L. Liddle	"	691	35.5
E. Morson	"	509	21.8
J. E. Van Buren	"	159	7.9
A. Waters	"	1,791	85.9
J. Cosgood	"	375	16.1
W. Burns, Black Creek	.....	227	9.7
L. Soda	"	937	46.8
L. Sharapata	"	622	29.2
J. Kotkowski	"	1,392	67.5
L. Hesick	"	560	24.
G. Slobenski	"	436	21.3
F. Melojick	"	1,779	72.9
L. Masada	"	969	40.2
S. Klappa	"	1,237	63.7
L. Marshall	"	480	26.4
A. Mashak	"	581	28.1
J. Shavke	"	979	39.1
E. Jasek	"	2,828	103.2
O. McKinney	"	1,471	63.2
G. Foab	"	983	34.3
W. Karsharski	"	1,581	67.9
P. Ward	"	591	31.3
W. Dudginski	"	1,263	44.2
S. Rozeski	"	1,297	53.8
J. Klappa	"	1,297	53.8
J. Sina	"	373	11.1
L. Riley	"	871	37.
C. Jasek, alias	.....	
R. Jasek	"	1,134	54.4
J. Washkowick	"	1,542	67.8

Name.	Creamery.	Lbs. milk.	Lbs. butter fat.
L. Washkowick, Black Creek.....		367	18.5
J. F. Frost "		1,228	52.8
A. Bednarick "		971	34.9
P. Swader "		666	30.9
M. Nowick "		629	25.7
L. Bednarick "		1,303	56.
O. A. Olson, Marion & Mt. Morris....		1,432	65.8
O. G. Shorestead "		4,600	197.8
J. Leach "		4,559	191.4
J. Cockrill "		1,037	43.5
J. Jarvis "		1,299	54.5
E. E. Elleckson "		4,164	174.8
L. P. Selsing "		1,407	80.1
H. Gaylord "		3,213	157.4
O. L. Atkins "		1,482	65.2
L. Selsing "		2,124	97.7
J. Selsing "		1,154	49.6
A. Selsing "		1,194	53.7
Wm. Jarvis "		2,270	93.
O. A. Johnson "		2,413	106.1
R. J. Johnson "		1,400	77.3
W. E. Scoville "		1,893	83.2
H. Olson "		2,820	132.5
Paul Schilert "		754	37.7
Wm. Hayes "		1,625	74.7
L. Bell "		710	32.6
L. Torgenson, or Erickson "		1,048	47.1
A. Aberson "		4,086	175.6
Mrs. Balm "		837	27.6
Nels Anderson "		1,543	67.8
B. Bendixson "		2,294	100.9
O. E. Thompson "		2,621	117.9
Joe Osterday "		65	2.7
E. P. Wilson "		2,119	80.5
Mrs. Randall "		1,511	67.9
F. Krobe, Spring Lake		864	45.7
W. Sexton "		3,042	139.9
C. Lamue "		3,262	133.7
H. Heffernon "		3,263	133.7
H. Luhm "		1,269	54.5
J. Joslyn "		1,839	87.3
E. Warner "		1,419	66.6
O. B. Marr "		1,055	40.5
J. Emigh "		2,390	95.6
E. Morson "		1,698	72.1
Ed. Leach "		3,880	170.7
Ed. Spurbeck "		2,012	106.6
G. Pyncheon "		1,894	103.2

Name.	Creamery.	Lbs. milk.	Lbs. butter fat.
F. Jennings, Spring Lake.....		1,450	73.9
E. Fuller	"	1,245	58.5
J. Godson	"	795	31.
C. Hall	"	706	28.9
O. Fratzke	"	2,237	97.3
J. Carpenter	"	1,402	63.7
H. Monshowski	"	1,639	72.9
J. Jennings	"	624	30.5
E. Letzlaff	"	2,934	142.3
G. Keehn	"	388	18.8
M. Booth	"	589	28.8
G. Rhoda	"	2,001	86.
S. Ryan	"	1,645	80.6
A. Nighbor, Golden Rod		209	8.6
H. Breckline	"	813	30.8
A. Schraeder	"	285	12.6
N. Smoody	"	237	9.5
N. Stocholski	"	226	8.9
N. Stocholski, Seneca.....		1,133	55.5
N. Smoody	"	1,195	58.5
H. Breckline	"	3,176	142.9
Wm. Nigbor	"	1,539	72.3
Wm. Markofski, alias Wm. Mar- hefke	"	1,382	64.2
H. Schraeder	"	1,425	73.3
Ed Zuehlke	"	3,388	143.9
Wm. Zuehlke	"	4,097	188.4
F. Breckline	"	4,097	76.3
H. Dahlke	"	697	36.5
B. Prigan	"	665	36.9
Ed. Finn	"	2,147	110.5
Paul Able	"	1,339	64.2
J. Wobschall	"	3,684	182.3
Fred Kolpine	"	1,387	74.8
Louis Kolpine	"	1,691	88.7
H. Yantz	"	1,399	75.5
J. Layman	"	3,007	183.4
Theodore Yantz	"	1,348	61.3
Louis Leasnake	"	1,050	51.9
F. Grams	"	2,677	144.5
F. Lichtenberg	"	1,385	78.9
J. Shermer	"	3,020	122.3
Chas. Schroader	"	1,683	82.4
Louis Schroader	"	2,565	132.
L. Able	"	3,991	193.5
N. Marks	"	880	53.2
Mrs. Zitton	"	1,975	115.5
John Schroader	"	2,279	121.9

41 That from the said milk so delivered by the said patrons to the Jenne Creamery Company so conducted as aforesaid at said creameries during the month of October, 1904, there was made more than 11,636 pounds of butter, for which there was collected on the sale thereof more than the sum of \$2,450.00 and that after deducting 3½ cents per pound for the making and handling thereof by said Jenne Creamery Company there remained more than 42-54 \$2,042.75 belonging to and to be divided among the said hereinbefore named persons delivering said milk during said month, and that on the basis of butter fat contained in their milk furnished they were entitled to receive more than 19 cents per pound for each pound of butter fat contained in their milk furnished during said month.

6.

That during the month of November, 1904, one Earl Chipman delivered to the Jenne Creamery Company at the Terrill Dairymen's Association creamery 158 pounds of milk containing 6.4 pounds of butter fat;

Name.	Creamery.	Lbs. milk.	Lbs. butter fat.
A. Wallers,	Terrill.....	465	21.3
E. E. Morson	"	232	9.5
John Roberts	"	600	31.2
Chas. Crigham	"	271	14.6
S. Ware	"	393	16.8
Geo. Trice	"	608	12.7
M. Percy	"	533	25.5
F. Georgeson	"	1,180	60.1
M. Lungwitz	"	815	42.3
Hans Rasmussen	"	143	6.4
J. W. Briggs	"	719	35.9
Fay Waite	"	484	22.2
H. Lamue	"	64	3.2
A. Terrill	"	1,092	58.9
L. Taylor	"	576	27.6
A. Cluey	"	1,134	53.2
H. Tice	"	781	40.6
M. Carpenter	"	688	34.4
A. Rivers	"	626	33.8
L. W. Chipman	"	2,333	111.9
Otto Lungwitz	"	1,704	81.7
A. Morson	"	1,430	77.2
L. Bednarick, Black Creek.....		540	25.9
S. Klappa	"	279	11.1
A. Mashak	"	394	17.7
J. Shavke	"	343	13.7
E. Jasek	"	1,520	60.8
R. McKinney	"	495	22.2
G. Foab	"	356	14.2
W. Karsharski	"	645	34.8

Name.	Creamery.	Lbs. milk.	Lbs. butter fat.
P. Ward,	Black Creek.....	200	12.
W. Dudginski	"	801	28.
S. Rosezski	"	419	25.1
J. Klappa	"	672	28.2
L. Riley	"	351	16.8
C. Jasek	"	369	15.1
J. Washkowiek	"	765	32.1
L. Washkowiek	"	127	6.
J. F. Frost	"	332	14.6
A. Bednarick	"	347	18.
P. Swader	"	146	7.3
M. Nowick	"	63	2.7
L. Masada	"	312	16.8
F. Melojick	"	650	22.1
G. Slobenski	"	149	5.9
L. Hesick	"	61	2.7
J. Kotkowski	"	620	37.2
L. Sharapata	"	426	18.3
L. Soda	"	43	20.8
O. A. Olson, Marion & Mt. Morris.....		620	29.7
O. G. Shorstead	"	1,530	17.3
J. Leach	"	2,022	84.9
J. Cockrill	"	560	24.6
J. Jarvis	"	481	20.2
C. Elleckson	"	1,249	57.4
L. P. Selsing	"	640	37.1
H. Gaylord	"	919	49.6
O. L. Atkins	"	710	31.2
J. Selsing	"	726	26.7
L. Selsing	"	809	28.6
A. Selsing	"	581	26.7
Wm. Jarvis	"	787	25.9
O. A. Johnson	"	1,036	45.5
R. J. Johnson	"	674	36.3
V. E. Scoville	"	2,801	35.2
H. Olson	"	1,056	50.6
P. Schilert	"	197	9.8
Wm. Hayes	"	869	38.2
L. Bell	"	302	15.1
B. Bendixson	"	141	6.4
Nels Anderson	"	900	39.6
C. P. Wilson	"	882	33.5
A. Arveson	"	1,431	65.8
Mrs. Randall	"	636	29.2
Mrs. Balm	"	197	9.
F. Kroepe, Spring Lake.....		219	10.9
W. Sexton	"	930	38.1
C. Lamue	"	953	39.
H. Heffernon	"	953	39.

Name.	Creamery.	Lbs. milk.	Lbs. butter fat.
H. Luhm, Spring Lake.....		346	14.5
J. Joslyn ".....		856	40.2
E. Warner ".....		485	22.3
O. B. Marr ".....		442	18.1
J. Emigh ".....		875	35.
P. Morson ".....		620	30.3
Ed. Leach ".....		1,411	63.4
Ed Spurbeck ".....		715	37.8
G. Puncheon ".....		770	41.5
F. Jennings ".....		736	33.1
E. Fuller ".....		411	19.3
J. Godson ".....		388	16.2
C. Hall ".....		375	13.5
A. Fratzkie ".....		742	37.1
J. Carpenter ".....		668	30.7
H. Monshowski ".....		474	22.2
J. Jennings ".....		244	11.7
E. Letzlaff ".....		862	48.2
B. Keehn ".....		186	8.5
G. Rhoda ".....		926	38.8
L. Ryan ".....		598	29.9
H. Breckline, Seneca.....		1,292	58.1
Wm. Zuehlke ".....		1,787	76.8
Ed Zuehlke ".....		935	40.2
Herm. Schroader ".....		878	43.
W. Nighbor ".....		636	31.8
Louis Kolpine ".....		467	73.3
Fred Kolpine ".....		187	9.3
J. Wobschall ".....		724	34.
Paul Abel ".....		710	35.5
Ed. Finn ".....		778	16.4
B. Prigan ".....		143	8.
H. Dahlke ".....		255	12.7
J. Layman ".....		673	40.4
F. Grams ".....		654	36.6
Louis Leasnake ".....		676	29.7
Jos. Shermer ".....		1,038	45.6
F. Lichtenberg ".....		424	23.3
Chas. Schroader ".....		891	40.9
L. Schroader ".....		933	46.7
L. Abel ".....		1,705	83.5
N. Marks ".....		313	17.5
Mrs. W. Zitlow ".....		543	27.1
John Schroader ".....		608	34.

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55 That from the said milk so delivered by the said patrons to the Jenne Creamery at said creameries during the month of November, 1904, there was made more than 3508 pounds of butter for which there was collected on the sale thereof more than the sum of \$869.44 and that after deducting $3\frac{1}{2}$ cents per pound for the making and handling thereof by said Jenne Creamery Company, there remained more than \$746.65 belonging to and to be divided among the persons delivering said milk during said month, and that on the basis of butter fat contained in their milk furnished they were entitled to receive more than 19.4 cents per pound for each pound of butter fat contained in their milk furnished during said month.

7.

That all of the butter made from milk delivered during the months of October and November was sold, and that drafts and checks in payment thereof were sent, for the most part by mail, by the purchasers to the Jenne Creamery Company so doing business as aforesaid, and were received by the said Brown, the cashier of the Berlin National Bank, and were by him in form credited to the Jenne Creamery Company, said bank receiving all said proceeds, the Berlin National Bank through its said officers then in effect carrying on the business of the said Jenne Creamery Company, and being fully advised and having full notice and knowledge of all the facts hereinbefore alleged, and of the fact that the proceeds of the sales of the said butter belonging to the persons furnishing milk as hereinbefore stated and that said proceeds were to be divided among them and turned over to them.

8.

That of the proceeds received as aforesaid from the sales of butter from said milk furnished in October and November, 1904, the sum of \$105.67 was received from Geo. Middendorf & Company of Chicago about October 10th, 1904; that the same was received in the form of the check or draft and was sent by the Berlin National Bank to the First National Bank of Chicago, and was thereafter
56 collected and credited by said Chicago bank to the account of the Berlin National Bank.

9.

That of the proceeds received as aforesaid from the sales of butter from said milk furnished in October and November, 1904, the sum of \$362.62 was received from Thomas C. Jenkins of Pittsburg Pa. about November 5, 1904; that the same was received in the form of a check or draft and was sent by the Berlin National Bank to the First National Bank of Chicago, and was credited by said Chicago bank to the account of the Berlin National Bank.

10.

That of the proceeds received as aforesaid from the sales of butter from said milk furnished in October and November, 1904, the sum of \$429.98 was received from Thomas C. Jenkins of Pittsburg, Pa.

about November 14, 1904; that the same was received in the form of a check or draft and was sent by the Berlin National Bank to the First National Bank of Chicago, and was credited by said Chicago bank to the account of the Berlin National Bank.

11.

That of the proceeds received as aforesaid from the sales of butter from said milk furnished in October and November, 1904, the sum of \$336.57 was received from Thomas C. Jenkins of Pittsburg, Pa. about October 24, 1904; that the same was received in the form of a check or draft and was sent by the Berlin National Bank to the First National Bank of Chicago, and was credited by said Chicago bank to the account of the Berlin National Bank.

12.

That of the proceeds received as aforesaid from the sales of butter from said milk furnished in October and November, 1904, the sum of \$163.29 was received from Geo. Middendorf & Co. of Chicago, about October 17, 1904; that the same was received in the form of a check or draft and was sent by the Berlin National Bank to the First National Bank of Chicago, and was credited by said Chicago bank to the account of the Berlin National Bank.

57

13.

That thereafter said Chicago bank remitted to said Berlin National Bank for the proceeds of said checks and drafts, and that said proceeds of said checks and drafts so remitted to it as aforesaid were placed by the Berlin National Bank in its safe in its vault and there remained until the failure and suspension of said bank as hereinafter set out.

14.

That \$337.50, proceeds of sales of butter made from the said milk furnished in October and November was sent by the purchaser of butter, to-wit: Thomas C. Jenkins by check on Pittsburg bank, and such check was, by the said Berlin National Bank sent to its correspondent bank, the First National Bank of Milwaukee for collection, and received by it on or about November 1st, 1904.

15.

That said First National Bank of Milwaukee thereafter collected said check, and that the proceeds thereof remained in its hands until after the closing or suspension of the Berlin National Bank, when the same were turned over to the defendant P. R. Earling, the receiver of the Berlin National Bank as such receiver.

16.

That \$123.00, proceeds of sales of butter made from the said milk furnished in October and November was sent by the purchaser of butter, to-wit: S. Ewart & Company by check on Pittsburg bank, and such check was, by the said Berlin National Bank sent to its

correspondent bank, the Hanover National Bank of New York for collection, and received by it on or about October 24, 1904.

17.

That said Hanover National Bank thereafter collected said check, and that the proceeds thereof remained in its hands until after the closing or suspension of the Berlin National Bank, when the
58 same were turned over to the defendant, P. R. Earling, the receiver of the Berlin National Bank as such receiver.

18.

That \$129.00, proceeds of sales of butter made from the said milk furnished in October and November, was sent by the purchaser of butter, to-wit: S. Ewart & Company by check on Pittsburg bank, and such check was by the Berlin National Bank sent to its correspondent bank, the Hanover National Bank of New York for collection, and received by it on or about October 29th, 1904.

19.

That said Hanover National Bank thereafter collected said check, and that the proceeds thereof remained in its hands until after the closing or suspension of the Berlin National Bank, when the same were turned over to the defendant, P. R. Earling, the receiver of the Berlin National Bank as such receiver.

20.

That \$77.50, proceeds of sales of butter made from the said milk furnished in October and November was sent by the purchaser of butter, to-wit: S. Ewart & Company by check on a Pittsburg bank, and such check was, by the said Berlin National Bank sent to its correspondent bank, the Hanover National Bank of New York for collection, and received by it on or about October 2, 1904.

21.

That said Hanover National Bank thereafter collected said check, and that the proceeds thereof remained in its hands until after the closing or suspension of the Berlin National Bank, when the same were turned over to the defendant, P. R. Earling, the receiver of the Berlin National Bank as such receiver.

22.

That -139.35, proceeds of sales of butter made from the said milk furnished in October and November was sent by the purchaser of butter, to-wit: S. Ewart & Company by check on Pittsburg bank, and
59 such check was by the said Berlin National Bank sent to its correspondent bank, the Hanover National Bank of New York for collection, and received by it on or about November 5,
1904.

23.

That said Hanover National Bank thereafter collected said check, and that the proceeds thereof remained in its hands until after the closing or suspension of the Berlin National Bank, when the same were turned over to the defendant, P. R. Earling, the receiver of the Berlin National Bank as such receiver.

24.

That \$102.00 proceeds of sales of butter made from the said milk furnished in October and November was sent by purchaser of said butter to-wit: S. Ewart & Co. by check on a Pittsburg bank and was received by said Berlin bank on the day it closed to-wit: on the 17th day of November A. D. 1904 and said check afterwards came into the possession of the defendant, P. R. Earling, as receiver of the Berlin National Bank and the said check was collected by him and the proceeds, being the amount thereof, are now in his hands.

25.

That \$81.60 proceeds of sales of butter made from the said milk furnished in October and November was sent by the purchaser of said butter to-wit: S. Ewart & Co. by check and was received by the defendant, P. R. Earling, the receiver of the Berlin Bank as such receiver on or about the 28th day of November, A. D. 1904 and said check was afterwards collected by him and the proceeds thereof, being the amount of said check, are now in his hands.

26.

That \$470.62 proceeds of sales of butter made from the milk furnished in October and November was sent by the purchaser of said butter to-wit: Thomas C. Jenkins by check and was received by the defendant, P. R. Earling the receiver of the Berlin National Bank as such receiver on or about the 22nd day of November, A. D. 1904 and said check was afterwards collected by him and the proceeds thereof being the amount of said check, are now in his hands.

60 That \$257.69 proceeds of sales of butter made from the said milk furnished in October and November was sent by the purchaser of said butter, to-wit: Thomas C. Jenkins by check and was received by the defendant P. R. Earling, the receiver of the Berlin National Bank as such receiver on or about the 27th day of November A. D. 1904 and said check was afterwards collected by him and the proceeds thereof, being the amount of said check, are now in his hands.

28.

That all of the proceeds from the sales of said butter as received by the said Berlin National Bank and received by said defendant P. R. Earling as receiver of said Berlin National Bank were and are equitably and beneficially the property of and owned by the said furnishers of said milk out of which said butter was made and their assigns and were and are a trust fund in the hands of said Berlin National Bank and in the hands of said receiver, belonging equitably

and beneficially to said furnishers of milk out of which said butter was made and their assigns and all the said proceeds of the sales of said butter are now in the hands of said defendant, P. R. Earling the receiver of the Berlin National Bank as such receiver and are held by him in trust and for the benefit of said furnishers of said milk out of which said butter was made and their assigns.

29.

And that said defendant P. R. Earling the receiver of the Berlin National Bank as such receiver refuses to account for and pay over said moneys, that prior to the commencement of this action, an accounting thereof and payment thereof was duly demanded of him by the plaintiffs who were then and are now by due assignment and purchase the owners of said funds and all claims therefor and are now legally and equitably entitled to demand and receive all of said moneys now in the hands of said defendant receiver as aforesaid and as well are the owners of all claims against such receiver and
61 the Berlin National Bank therefor.

30.

That the defendant the Berlin National Bank and its said officers and directors so running and conducting and carrying on in the interest of said bank the business of the Jenne Creamery Co. as aforesaid took the milk furnished by the various patrons during the months of April, June, July and August and September 1904 and made the same into butter and sold the same and collected the proceeds thereof and placed said proceeds in the said Berlin National Bank and that the said proceeds of the sale of said butter, so received by said defendant bank as aforesaid, equitably and beneficially belonged to and, was the property of the said persons furnishing milk during said respective months as aforesaid. That said defendant bank and its said officers in conducting and carrying on for its own interest the said business of the said Jenne Creamery Company pretended to divide and proportion said proceeds among the several parties entitled thereto and caused to be issued therefor checks drawn in form in the name of the Jenne Creamery Company but signed by the said Brown the cashier of said bank and drawn on said bank and that such checks purported to evidence the proportion of the amount of said proceeds belonging to the said several patrons but as to whether or not the said proceeds were correctly apportioned and divided or whether or not the whole thereof were so divided these plaintiffs have no definite information and pray an accounting therefor and thereof.

31.

That one A. Betky delivered milk under the arrangements hereinbefore set out during the month of April 1904 and was entitled to \$3.87 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was issued therefor payable to said last named person and the amount thereof and evidenced thereby or such greater sum as he may have been legally, equitably and beneficially entitled to out of the proceeds of said

62 butter for said month was legally, equitably and beneficially said patron's property and was then and there in the hands of the defendant, the Berlin National Bank and in law and equity said bank held the same for him and that said check and the fund thereby represented never was paid and said fund, the property of said patron, remained so far as plaintiffs are informed and believe still remains in the hands of said Berlin National Bank or its said receiver and no part thereof has been paid. That the claim and demand therefor and all claims and demands of said patron against said defendant bank were before the commencement of this action duly assigned for value to these plaintiffs in writing and that they are now the owners thereof and these plaintiffs further allege that said fund or the proceeds thereof or so much thereof as may be now in the hands of the said bank or its said receiver are the property of these plaintiffs and they are now entitled thereto and if said funds or the proceeds thereof or any part thereof have been diverted or used by said Berlin National Bank so that the same or the proceeds thereof do not now remain in the hands of said bank or its said receiver, that then the said Berlin National Bank is indebted to these plaintiffs in the amount so diverted and liable to them therefor and said plaintiffs ask an accounting therefor and thereof and that it is necessary that a determination of the amount of the funds in the hands of the defendant P. R. Earling as receiver of the said defendant bank belonging to these plaintiffs as assignees of said patron be had as well as a determination of the amount of liability of said bank and its said receiver for any of said funds which may have been diverted or otherwise disposed of by said bank, its officers, agents or directors.

32.

That one T. Ryan furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$24.08 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was issued therefor payable to said last named person * * *

* * * * *

33.

63 That one E. Fuller furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$6.16 or more of the proceeds of the butter sold, made from the milk furnished in said month. That
64 a check was issued therefor payable to the said last named person * * *

* * * * *

34.

65 That one L. Hesick furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$7.29 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was issued therefore payable to said last named person * * *

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66

35.

That one L. Taylor furnished milk under the arrangements here-
inbefore set out during the month of September, 1904, and was
entitled to \$23.10 or more of the proceeds of the butter sold, made
from the milk furnished in said month. That a check was issued
therefor payable to said last named person * * *

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67

36.

That one A. Terrill furnished milk under the arrangements here-
inbefore set out during the month of September, 1904, and was en-
titled to \$14.43 or more of the proceeds of the butter sold, made from
the milk furnished in said month. That a check was issued there-
for payable to said last named person * * *

* * * * *

68

37.

That one G. Luhm furnished milk under the arrangements here-
inbefore set out during the month of November, 1904, and was en-
titled to \$2.47 or more of the proceeds of the butter sold, made
from the milk furnished in said month. That a check was issued
therefor payable to said last named person * * *

* * * * *

69

38.

That one C. Hall furnished milk under the arrangements herein-
before set out during the month of September, 1904, and was en-
titled to \$4.11 or more out of the proceeds of the butter sold, made
from the milk furnished in said month. That a check was issued
therefor payable to said last named person * * *

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39.

That one G. Pyncheon furnished milk under the arrangements
hereinbefore set out during the month of September, 1904, and was
entitled to \$21.64 or more of the proceeds of the butter sold, made
from the milk furnished in said month. That a check was issued
therefor payable to said last named person * * *

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40.

That one M. Booth furnished milk under the arrangements here-
inbefore set out during the month of September, 1904, and was en-
titled to \$14.78 or more of the proceeds of the butter sold, made
from the milk furnished in said month. That a check was issued
therefore payable to said last named person * * *

* * * * *

72

41.

That one E. Letlaff furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$31.37 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was issued therefore payable to said last named person * * *

* * * * *

73

42.

That one A. Selsing furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$27.56 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was issued therefore payable to said last named person * * *

* * * * *

74

43.

That one Ole Tomson furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$24.31 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was

75 issued therefore payable to said last named person * * *

* * * * *

44.

That one L. P. Selsing furnished milk under the arrangements hereinbefore set out during the month of September, 1904, and was entitled to \$10.70 or more of the proceeds of the butter sold, made from the milk furnished in said month. That a check was issued therefore payable to the last named person * * *

* * * * *

77

That said check was on the 19th day of November, 1904, duly presented for payment, payment refused and the same duly protested for non-payment whereby \$2.64 fees of said protest were necessarily incurred and were paid by said Selsing and for which said sum said defendant bank is indebted to said plaintiffs as of said Selsing.

* * * * *

45.

That one John Ring furnished milk under the arrangements hereinbefore set out during the months of June and August, 1904, and was entitled to \$59.76 or more of the proceeds of the butter sold, made from the milk furnished in said months. That checks were issued therefore and payable to said last named person * * *

* * * * *

78

46.

That one J. Carpenter furnished milk under the arrangements hereinbefore set out during the months of July, August and September, 1904, and was entitled to \$78.65 or more of the proceeds of the butter sold, made from the milk furnished in said months. That checks were issued therefore payable to said last named person

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79

47.

That one M. Carpenter furnished milk under the arrangements hereinbefore set out during the months of August and September, 1904, and was entitled to \$42.05 or more of the proceeds of the butter sold, made from the milk furnished in said months. That checks were issued therefore payable to said last named person

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80

48.

That one L. Erickson furnished milk under the arrangements hereinbefore set out during the months of August and September, 1904, and was entitled to \$17.47 or more of the proceeds of the butter sold, made from the milk furnished in said months. That checks were issued therefore payable to said last named persons

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49.

That one O. A. Olson furnished milk under the arrangements hereinbefore set out during the months of July, August and September, 1904, and was entitled to \$43.17 or more of the proceeds of the butter sold, made from the milk furnished in said months. That checks were issued therefore payable to said last named person

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83

50.

That all the claims and demands and rights of action of each and all of the patrons hereinbefore named and described against the defendants for the recovery of the proceeds of the sales of butter made from the milk furnished by them and for damages or other relief for the withholding, loss or diversion of any part thereof, prior to the commencement of this action were duly assigned, transferred and conveyed, for value to the plaintiffs who are now the owners and holders thereof.

That prior to the commencement of this action the plaintiffs duly presented their said claim and claims to and demanded of the defendant, P. R. Earling, the receiver of the Berlin National Bank, an accounting of and the payment to them of all funds in his hands

belonging to them in their own behalf and as assignees of the patrons hereinbefore named and described, and that if on such accounting it appeared that any of said proceeds had not come into his hands that their claims for such part of their proceeds against the Berlin National Bank be allowed, and that they be paid by him as such receiver, as other similar claims are paid, and said receiver refused payment thereof or an accounting thereof or to allow any of said claims, and denied the right of said plaintiffs thereto.

51.

That at the time of the making of the arrangement between the defendant bank, its officers and directors, and the Jenne Creamery Co. as hereinbefore set out, the said bank had notice of and well knew as did also its officers, agents and directors that the Jenne Creamery Co. was then and there grossly insolvent and that it then and there owed large sums of moneys to others than the said bank, all of which said facts in reference to the financial situation of the said Creamery Co. were unknown to the plaintiffs and to the patrons of said Creamery Co. and one of the purposes of the making of said arrangement between the said bank, its officers, directors and agents, as these plain-

84 tiffs were informed and believe, was to cause the patrons of said Creamery Company to continue to furnish their milk thereto by making it appear that said Jenne Creamery Co. was solvent and in a condition to continue its operation as a going concern, and as your plaintiffs are informed and believe said patrons were misled and deceived by such arrangement and were prevented thereby from ascertaining the actual financial condition of said Creamery Co. and because of said things did continue to furnish milk to said Creamery Co. so being conducted and run as aforesaid, which otherwise they would not have continued to do.

52.

That the said arrangement between the said bank, its officers and directors and said Creamery Co. was a private and secret one not of record, and not made in the form and manner provided by the laws of the state of Wisconsin, but made as it was as aforesaid for the purpose of deceiving the patrons of said Creamery Co. and of concealing the real arrangement and situation from said patrons, and that until after the failure of the defendant bank and said Creamery Co. these plaintiffs and said patrons whose claims have been assigned to them were and remained ignorant of the true situation of affairs and because thereof they did entrust their milk and the product thereof and the proceeds thereof to said Creamery Co. so run and conducted as aforesaid.

53.

That the said defendant bank, its officers, agents and directors, at all times after the making of the said arrangement with the Creamery Co. were at all times fully advised of and well knew the exact details and facts in reference to each and every transaction thereafter carried on, had, done or performed by, on the part of or with the said Creamery Co. so run and conducted as aforesaid, and the said defend-

ant bank at all times well knew and had full notice and knowledge that the moneys and other proceeds received for the sale of butter belonged legally, equitably and beneficially to the patrons furnishing the milk from which the same was manufactured, as the fact was, and well knew that the said proceeds in whomsoever's hands
85 the same might be were held for and belonged to said patrons.

54.

That said moneys for the purpose of safe keeping and accumulation, until they could be divided, were placed in the vaults of said bank or its correspondent banks, and were so held by it for the said owners thereof for the purpose aforesaid, and that said bank accepted said moneys knowing at all times to whom it belonged as aforesaid, and that said bank knew of and participated in all of the transactions of the Jenne Creamery Co. and of its own officers and directors in relation to all such matters, and in relation to all transactions made under the name of or in form as the acts of the Jenne Creamery Co. after the making of the arrangement between it and the defendant bank through its officers, agents and directors as aforesaid, and that said bank is chargeable with full notice thereof and is bound thereby as fully and to the same effect and extent as if the same had been done directly in its own name.

55.

That if any of the proceeds of the butter made during the time of said arrangement between the Jenne Co. and the bank through its officers, agents or directors as heretofore set out have been lost, diverted or otherwise disappeared so that the same are not now in the hands of said bank or its said receiver, for the plaintiffs as the owners thereof, then, that in such case, such loss or diversion or other disappearance of said funds or any part thereof is due to the misconduct, negligence or wrongful acts or omissions of the said defendant bank, its officers, agents or directors and because of the acts and doings of the said defendant bank, its officers, agents and directors in carrying out such arrangement with the Jenne Creamery Co. and others; and because of its active participation therein and knowledge thereof, and the said bank is liable to these plaintiffs for the amount of any such proceeds which may have been during said time diverted, lost or which may have otherwise disappeared and which belonged to these plaintiffs or any of the patrons hereinbefore named who have assigned their interest therein to these plaintiffs as aforesaid.

86

56.

That none of the sums belonging to and due the plaintiffs as aforesaid have been paid, and the said plaintiffs are now entitled thereto; that no accounting thereof or therefore has been made. That plaintiffs now are the owners and holders of all claims of all patrons now outstanding so far as they know or are informed and believe.

57.

That on or about the 17th day of November, 1904, the Berlin National Bank, being then insolvent, was duly closed by the Comptroller of the Treasury of the United States of America, and has ceased to do business as a bank; that thereafter P. R. Earling was duly appointed receiver of said national bank by said comptroller, and duly qualified and is now acting as such receiver of said bank, and all the funds, property and estate of said bank as well as the funds of these plaintiffs were by said bank and its officers turned over and delivered to him as such receiver and are now in his hands; that plaintiffs fear that unless enjoined he will pay out said funds now in his hands to the great injury and damage of these plaintiffs.

58.

That the Jenne Creamery Co. is now and has been for more than two years last past insolvent.

59.

That your plaintiffs have no adequate remedy at law. That an accounting by and from the defendants is necessary to determine the amount of butter made and the amount of the proceeds thereof, collected and received *ruing* the times hereinbefore mentioned, from the sale of the said butter made from the milk furnished by said patrons of said Creamery Co., and to determine further how much of said proceeds now are and remain or can be traced in the hands of the defendant bank or its said receiver, or the other defendants, and how much thereof belongs to the plaintiffs, and should be ordered and adjudged to be paid to them as their own, and further to determine what, if any amount of such proceeds have been diverted, lest
87 or do not now remain in the hands of said bank or its receiver for these plaintiffs, so that the liability of said defendant bank therefor to the plaintiffs may be determined and their claim therefor against said bank settled and allowed, and the said defendant receiver ordered and adjudged to pay the same dividends thereon as receiver as are to be paid upon other similar claims.

Wherefore, in consideration of the premises, these plaintiffs pray, that an accounting may be had as aforesaid and demand judgment that all funds or the proceeds thereof received from the sales of the butter made from the milk delivered by the patrons named in this complaint and as hereinbefore set out, which may now be or remain in the hands of the defendants, the Berlin National Bank, or of J. W. Brown, or said Jenne Creamery Company or P. R. Earling as receiver of the Berlin National Bank, or in the hands of any of them, may be ordered and adjudged to be the funds and property of these plaintiffs, and funds of which they are the owners, and that said defendants be ordered and adjudged to pay over and deliver the same to said plaintiffs, and for judgment in favor of the plaintiffs against said defendants for said sum, and that the plaintiffs do have and recover the same from the said defendants, and that said claim or the right of the plaintiff thereto be recognized and ordered and adjudged to be a prior claim on and prior right to said funds over

the claims of all other and all unsecured creditors of said defendant bank, and that if it shall appear that any of said proceeds have been lost or diverted or otherwise disposed of, then that the plaintiffs may have judgment against the defendants or any of them who may be liable therefore for such sum, and settling and fixing and determining the amount thereof as a claim against the Berlin National Bank and adjudging that the plaintiffs be recognized as a general creditor entitled to participate pro rata with the depositors and other general creditors in said bank in the distribution of its assets for said sum, and ordering and adjudging and decreeing that the defendant, P. R. Earling, as receiver of the Berlin National Bank, do pay to the plaintiffs such pro rata thereon as has been or may then have been or may thereafter be paid to other unsecured creditors of said defendant bank, or that he do certify the same to the controller to govern his actions in the premises in the manner and form provided by law, and said plaintiffs do further pray that said defendant, P. R. Earling, as receiver of the Berlin National Bank, may be enjoined from paying out any moneys in his hands as Receiver of the Berlin National Bank, without reserving and retaining ample and sufficient funds to pay such amount as may be awarded the plaintiffs as a prior fund in his hands, and as may be also sufficient to pay them their equal pro rata share of dividend on any amount for which they shall be found to stand as general or unsecured creditors, and plaintiffs pray, ask and demand such other or further relief as may be necessary, proper or equitable to enforce and preserve and protect their rights in the premises, or as may be provided by law or equity.

E. F. KILEEN,
Plaintiffs Attorneys.

THOMPSONS REED & PINKERTON,
Of Counsel.

* * * * *

92 & 93 For his separate answer herein, the above named defendant, P. R. Earling, alleges and shows to the Court the following:

First. Said defendant denies each and every allegation of the complaint herein, except, as hereinafter admitted, qualified or denied.

Second. The defendant admits that the following allegations contained in paragraphs numbered, 1 and 2 and 57 and 58 of said complaint are true.

Third. The defendant, above named, alleges that he has no knowledge or information sufficient to form a belief as to whether the allegations of the said complaint, as found in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 56, are true, and, therefore denies all the allegations of the said complaint contained in said paragraphs thereof last above mentioned.

Wherefore the defendant asks judgment that the action as to him be dismissed with costs.

PERRY NISKERN,
Att'y for Defendant.

* * * * *

94 & 95 For its separate answer herein the above named defendant, The Berlin National Bank, shows to the Court the following:

First. Said defendant denies each and every allegation of the complaint herein, except, as hereinafter admitted, qualified, or denied.

Second. Said defendants admits that the allegations contained in paragraphs numbered 1 and 2 and 57 and 58 of said complaint are true.

Third. Said defendant alleges that it nor its officers has any knowledge or information sufficient to form a belief as to whether the allegations of the complaint, as found in paragraphs 4, 5, 6, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 50, and 56 are true and therefore denies all the allegations of said complaint contained in said paragraphs thereof last above mentioned.

Wherefore the defendant asks judgment that this action as to it be dismissed with costs.

PERRY NISKERN,
Att'y for Def't.

* * * * *

96

Directions for Findings.

Upon consideration of this case I am satisfied that the affairs of the Jennes and of the Jenne Creamery Company were taken over and managed by the three directors of the bank primarily for the benefit of the bank, and that their management was in effect that of the bank. The bank through these three and its other directors had full knowledge of the matter and of the manner in which the business of the various creameries was being conducted. The deposits from the receipts of butter were trust moneys under the contracts and course of dealing with the various creameries, and the patrons who furnished the milk were the real owners of the net receipts from butter less the amount payable to the creameries under the contracts for making. The bank must be held to know of this trust and of the real ownership of the moneys so received. All such moneys and all that under the rule of law for identification can be considered as such that the bank had on hand at the time it closed its doors must be held as belonging to the plaintiffs. The bank will be presumed and deemed to have paid out during the months of Oct. and Nov. after the receipts from butter began the money in its vaults not subject to such trust rather than the trust moneys. The amount on hand at the time the bank closed its doors, which was less than the amount on hand at any previous time, up to the total amount of butter moneys for said months which the bank had theretofore received will be regarded as belonging to the plaintiffs, as well as all butter money received by the receiver after he took possession. As the amount turned over to the receiver exceeds the amount

97 of butter money theretofore received by the bank from the sales of said months, the receiver must be held to have received the full amount of such moneys for said months, and bound to pay them over to the plaintiffs.

As to all unpaid checks for the months previous to October there

appears no evidence of the amount of cash on hand by the bank prior to Sep. 28, and no other evidence from which it can be inferred that the trust money represented by said checks, or evidenced by them, was held by the bank when it stopped business. I think however that the bank must be held to have so treated such funds, by mingling them with its own, as to be liable for the amount of all such checks as a general creditor.

This I believe covers generally the points at issue. The plaintiff's attorney will prepare findings of fact and conclusions of law to carry out the views above expressed and submit them to opposing counsel before presenting for signature.

Briefs of counsel did not touch the question whether costs or interest should be allowed against the receiver. Counsel will please present briefs covering the points with the proposed findings.

Signed September 6, 1905.

CHESTER A. FOWLER,
Circuit Judge.

* * * * *

98 At a regular term of the circuit court for the county of Green Lake, held at the court house in the village of Dartford in said county of Green Lake, beginning on the first Tuesday after the third Monday in June, A. D. 1905.

Present, Hon. Chester A. Fowler, Circuit Judge Presiding.

This action having been regularly brought on for trial at the above term of the circuit court in and for the county of Green Lake, and the action having been by stipulation dismissed as to the defendant J. W. Brown, and the summons and complaint herein having been duly served upon the defendant, the Jenne Creamery Company, and it having duly appeared herein by Perry Niskern, its attorney, and more than twenty days having elapsed since the service of the summons and complaint upon it, and no answer or demurrer to the complaint on the part of the Jenne Creamery Company having been served upon the plaintiff's attorneys or received at the address mentioned in the summons, and the Jenne Creamery Company being now in default herein, and a trial herein having been duly had at said term by the court without a jury, the plaintiff appearing by E. F. Kileen, their attorney, and Thompson, Thompson & Pinkerton, of counsel, and the defendants appearing by Perry Niskern, their attorney and the court having duly made and filed its decision in writing herein, the Judge stating in his decision separately the facts found by him and his conclusions of law thereon, from which it appears that the plaintiffs are entitled to judgment herein as

99 hereinafter provided;

Now therefore, on motion of E. F. Kileen, attorney for plaintiffs, it is,

Ordered and adjudged, that John Emigh and O. L. Atkins, the plaintiffs, are the equitable and beneficial owners of the proceeds of the funds received by the defendants herein from the sale of the butter made from the milk furnished by the plaintiffs assignors in the month of October and the first half of the month of November,

1904, to the amount of two thousand five hundred and twenty dollars and forty six cents (\$2,520.46), and that the said proceeds to the said amount of \$2,520.46 are now in the hands of and held by the defendant, P. R. Earling, as receiver of the Berlin National Bank, for the sole benefit and use of the plaintiffs herein who are hereby adjudged to be the true and rightful owners thereof and entitled thereto.

Further ordered and adjudged, that the plaintiff-, John Emigh and O. L. Atkins, do have and recover of and from the defendant, P. R. Earling, as Receiver of the Berlin National Bank, said sum of \$2,520.46, which amount the said defendant, P. R. Earling, as receiver of the Berlin National Bank, is hereby ordered and adjudged to pay out of the funds which have come into his hands as receiver of the Berlin National Bank, within thirty days from the date of the service of notice of the entry of this judgment upon him, such payment of said sum by said receiver to the plaintiffs to be made by priority over all general and unsecured creditors of the Berlin National Bank, or that the said defendant, P. R. Earling, as receiver of the Berlin National Bank, within said thirty days, certify the same to the comptroller of the currency with a copy of this judgment;

100 Further ordered and adjudged, that the plaintiffs, John Emigh and O. L. Atkins, in addition to the foregoing, do have and recover of and from the defendants, the Berlin National Bank and the Jenne Creamery Company, the sum of four hundred and six dollars and ninety seven cents, (\$406.97);

Further ordered and adjudged, that the plaintiffs, John Emigh and O. L. Atkins, are entitled to have the amount of their said claim, as above adjudicated, & adjudged against the Berlin National Bank, to-wit: For the sum of four hundred and six dollars and ninety seven cents (\$406.97), recognized and allowed as a valid claim against the Berlin National Bank, and they hereby are recognized as general creditors of the defendant, the Berlin National Bank, for said sum of \$406.97, and entitled to participate pro-rata with the other general creditors of said Berlin National Bank in the distribution of its assets by the defendant, P. R. Earling, as receiver thereof, and he is ordered and adjudged to pay the plaintiffs the same dividends on said sum of \$406.97 as have been heretofore or may hereafter be paid to the other general creditors of the Berlin National Bank, and on the amount of any dividend heretofore declared to pay them, in addition to their pro-rata share of such dividend, interest on their said share from the time such dividend was payable to the other general creditors to the date of the payment of their share thereof to them, or that the said defendant receiver, within thirty days from the service of notice of the entry of this judgment upon him, certify the same to the comptroller of the currency, with a copy of this judgment;

Further ordered and adjudged, that the plaintiffs, John Emigh and O. L. Atkins, do have and recover of and from the defendant, P. R. Earling, as receiver of the Berlin National Bank, their taxable costs and disbursements herein, amounting to the sum of
101-108 two hundred twenty one dollars and twenty-three cents, which sum is hereby ordered and adjudged to be paid to

said plaintiffs by said receiver in full out of the funds in his hands as receiver of the Berlin National Bank, and as a part of his expense of administration, or that said defendant receiver, within thirty days from the service of notice of the entry of this judgment upon him, certify the same to the comptroller of the currency, with a copy of this judgment.

Dated this 29th day of November, A. D. 1905.

By THE COURT,
CHESTER A. FOWLER.

(Judgment Record, Vol. 5, Page 200.)

* * * * *

109 STATE OF WISCONSIN:

In Circuit Court for Green Lake County.

JOHN EMIGH et al., Plaintiffs,

vs.

P. R. EARLING, Receiver, and THE BERLIN NATIONAL BANK, and the
JENNE CREAMERY COMPANY, Defendants.

Bill of Exceptions.

In the above entitled action at the June, 1905, term of said court, before the Court without a jury, the following proceedings were had

It was agreed to by the parties that the examination of J. W. Brown and P. R. Earling taken herein under Sec. 4,096 of the Wisconsin Statutes may be used the same as if the testimony were given on the trial, subject to objections as to competency and materiality. Such examination in writing hereto annexed and made part hereof, marked Ex. "A."

John W. Brown, sworn for the plaintiffs testified: "These exhibits 1, 2, 3 and 4 appear to be the same exhibits that were submitted to me at the examination before Commissioner Wood which has been offered in evidence here, also Ex. 5. Exhibits 7, 8, and 9 are some more of the leases and agreements and appear to be the same exhibits that were at the examination. Ex. 6 is the agreement made with the Jenne Creamery Company concerning which I testified at that time. That is the writing."

By PLAINTIFFS: I understand, Mr. Niskern, we won't have to produce and offer now the bank checks which he testified from?

By DEFENDANT'S COUNSEL: "No."

By PLAINTIFFS: That is, the testimony covering that will stand?

By DEFENDANTS: Yes, only I want to reserve the right to object to the testimony for different defendants, that's all.

By PLAINTIFFS: Not as incompetent?

By DEFENDANTS: No, as immaterial and irrelevant.

(Witness Brown further testified:) Exhibit 10 is the shipping book referred to in that testimony and Exhibit 11 is the bank book

of the Jenne Creamery Company referred to in that testimony. In the months of April, June, July, August and September, 1904, in carrying on the business of The Jenne Creamery Company, they took the milk of the different patrons at the different stations and made it into butter and sold it and collected the proceeds just as they did in October and November.

110 And for June, July, August and September we had an apportionment made of the amount that was coming to each patron and checks were drawn.

Q. And when you delivered the checks to the different patrons, you delivered at the same time a statement of the amount of milk they had furnished, the amount of butter fat in it, and the amount per pound they were entitled to and the total amount, did you not?

A. The statement was printed on the outside of a manilla envelope and the check enclosed, similar to those statements that were shown me that were issued for October and November. Those checks for each patron purported to evidence the proportion of the amount of the proceeds that belonged to the party named therein. Exhibits 12a to 12h and Exhibits 13, 14, 15, 16 and 17 are checks issued to patrons for their proportionate share of the proceeds of butter, made and sold during the month preceding their date. Those checks show the proportionate part of the proceeds of butter collected that belonged to these different parties for the month preceding the date of each check, I think none of those checks have been paid. They do not appear to have been paid. So far as I know the parties therein named have never received the proportion of the proceeds of the butter represented by those checks. If those parties had received the proportion coming to them as evidenced by those checks, the checks would have been returned. We would have got the checks back.

Q. It is evident that these checks were not presented before the bank closed?

A. I think so but there were a very large number of checks that were paid some of them might have been not marked paid, that's all. What became of them, I don't know. I couldn't identify a single check. At the time these checks were made, I was familiar with the business of the preceding month and supervised the getting out of the statements and the checks. They were as near correct as we could make them. The letter "G" signifies Germania, Patron No. 3, on the milk sheet, it shows it was Germania factory. "B. C." means Black Creek, "T" Terrill, "M" & "M" Mt. Morris and Marion, "Nesh." Neshkoro, "S. L." Spring Lake. I think the "G" on this Bettke check is not for the Golden Rod, I think we designated Golden Rod by "G. R.". I am not sure. In May, 1904, I did not have any Germania. I think "G" may be Golden Rod. I don't know what time the Germania factory discontinued. (Witness shown statement.)

111 That was also called the Red Granite Dairy Association. I think that was the corporate name.

PLAINTIFF'S COUNSEL: Have you, Mr. Niskern, got the milk

sheets showing the milk delivered by the patrons during October and the first half of November?

Mr. NISKERN: I don't know. I think we have for October but not for November.

WITNESS (continues:) I do not know that I have any of the milk sheets for October or November. Miss Madge Stedman for the last year and a half or two years did the work of determining the amount which each patron was entitled to of the proceeds of the sales of butter each month. I gave her the figures from which she made the figures. I gave her the gross figures from the shipping book. She gave me the figures of the butter-fat that the milk produced and I made the calculation and gave her the result of my calculations, from which she figured the amount due each patron. She took the milk sheets and entered the quantity of milk opposite the patron's name in a book and estimated the amount of butter-fat that each patron furnished according to the test that his milk gave and gave me the total amount of butter-fat made during the month; then I ascertained the amount of butter sold and calculated the price for making at three and a half cents per pound; deducting that price from the proceeds the balance I divided to ascertain the amount due each patron according to the amount of butter-fat he furnished—that is, the price rather—that was the way the price was ascertained for butter-fat. Then I multiplied the pounds of butter-fat each patron furnished by the price per pound to get the amount each one was entitled to. That is the way the fund was divided among the patrons all the time as long as I had anything to do with it. To figure out the division for October and the first half of November I would need the shipping book showing what I received from the butter, we kept a record in the shipping book of the shipment and proceeds received after the check was returned to us. Sometimes there was a shrinkage or something like that. We couldn't always determine when a bill was made out whether we were getting that amount or not. I testified to all those amounts of my own knowledge at Berlin.

Q. From the milk sheets and shipping book and you determined the division. Was anything else needed?

A. No, the only thing that had to be determined was the exact amount of butter belonging to each month. Sometimes there was difficulty in ascertaining that on account of the carelessness of the foreman at the shipping point. If the proceeds of one month's butter went into the wrong month, why, there was trouble. At the examination at Berlin, I made no careful examination of the books.

I did as well as I could at the time. I do not know where
112 the milk sheets for the first half of Nov. are. I did not have them for the first half of November. The bank suspended the 17th of November. I wouldn't get the milk sheets until the end of the month. I don't think I received them at all, if I did, I turned them over to Miss Stedman, who was doing the work for the Spring Lake factory. Mr. Metcalf is the man that the Jenne Creamery Company employed to look after the business. He was employed from the time I had anything to do with the matter until

they closed. The name of the Chicago correspondant of the Berlin National Bank was The First National Bank of Chicago. The bank books are over at the hotel.

Q. Could you state whether or not shortly prior to the failure of The Berlin National Bank the Chicago correspondent bank sent up Three Thousand Dollars in Currency?

By DEFENDANTS: That is objected to on the part of the receiver and on the part of The Berlin National Bank on the ground that it is irrelevant and immaterial.

Mr. THOMPSON: Do you mean not the best evidence?

Mr. NISKERN: No.

Mr. THOMPSON: Do you want me to send for the book?

Mr. NISKERN: No, I don't care anything about the book. That evidence doesn't have anything to do with their liability. That is my objection.

COURT: Then your objection is on the ground that it is irrelevant and immaterial?

Mr. NISKERN: Yes, put it that way. That's good enough.

COURT: Well, how is that material, the amount he received from this bank?

Mr. THOMPSON: The testimony already in, which we didn't read to the Court, shows that they sent drafts received from the sale of butter to different correspondent banks, some of them to this Chicago bank, and that at the time the receiver was appointed there was not in the Chicago bank any funds, at least not any more than sufficient to pay what they owed the Chicago bank: that is, the bank in Chicago appropriated whatever little fund was there to pay some claim it had against the Berlin National Bank. We wanted later to have the court determine whether we were not entitled to trace that \$3,000.

COURT: If you make the connection it would be material from your point of view. He may answer.

Exception by each defendants Earling and Berlin National Bank."

A. The bank received \$3000.00 on the morning of the 17th of November 1904 at about half past 11.00 from the First National Bank. No payments were made on the October and November shipments of butter. I do not think Mr. Metcalf held any stock in the Jenne Creamery Company while I was connected with it. I think Exhibits 19, 20, 21, 22, 23 and 24 are the same statements that were shown to me and are mentioned in my testimony, given at Berlin before the Commissioner. That is for the month of October. Those were prepared by Miss Stedman under my direction. The bunches marked Exhibits 25 to 29 inclusive, I presume, are similar statements for the first half of November. They appear to have been marked as Exhibits there at that examination and shown me at Berlin. They were prepared by Miss Stedman; that is her handwriting, they were not done under my direction though. They were done after the bank closed. They were bringing milk every other day to the factory at that time; it covers the amount of butter that was shipped up to Nov. 15th. The rest of the butter after the milk of the 13th was on hand at the factory, never came into the

possession of The Jenne Creamery Company. It is the 13th on the statement but it covers the butter shipped out to the 15th. I made these computations for the October statement in the manner
 113 I testified and they are correct to my best knowledge and belief so far as the number of pounds of milk and butter-fat is concerned and the amount furnished by each customer.

By PLAINTIFFS' COUNSEL: I offer in evidence the statements for October.

By DEFENDANTS' COUNSEL: I object to all of them on the part of the defendant, the Berlin National Bank, as irrelevant and immaterial and I move to strike out on the part of those two defendants the testimony had so far in relation to the disposition of them on the ground that they are immaterial.

By the COURT: They may be received. The motion to strike out is denied.

The objecting defendants excepted.

Cross-examination of the Witness BROWN:

When this paper Ex. 6 was made, it was after that time that I began managing the affairs of The Jenne Creamery Company. It was within a few days after; I don't know the exact time. No officer of The Berlin National Bank had, as an officer of the bank, anything to do with the execution or preparation of that agreement.

Q. What was the first thing that occurred that led to the formation to that agreement?

A. Mr. E. H. Jenne and his brother-in-law, Mr. Parrot, came into the bank where I was and wanted to see me privately. I went with them into the back room or the Directors' room. They stated their condition and they said they wanted to place all of their property in my hands for the purpose of paying off their debts. I tried to persuade them to carry on their business, but they gave the statement that they didn't feel competent to do that—that is, Mr. E. H. Jenney; the older man was not present—and as a result I had one of two interviews with them. I consented to take their assets and convert them into cash and pay off their debts. At the time it was supposed that they would—I consented to take their assets and convert them and pay off the debts and then this agreement was drawn. I don't remember whether I was present. You (defendants' counsel) made this agreement but whether you made it under the direction of both of us, I don't know. I think it was under the direction of E. H. Jenne. I don't think I was present at the time. I think I told him to go to you and state the circumstances and have it reduced to writing. At that time the stock of the Jenne
 114 Creamery Company was owned by E. H. Jenne and wife and D. J. Jenne.

Q. And pursuant to that agreement, what was done with that stock?

A. In order to hold the corporation intact, it was assigned to myself, Mr. Foster and Mr. Horace Stedman. By my direction part of the stock was assigned to Mr. Stedman and Mr. Foster in order to

prevent the corporation from being dissolved. Mr. Stedman and Mr. Foster at that time were officers of The Berlin National Bank.

Q. They had one share apiece didn't they? It was assigned to them by your directors?

A. I don't remember the number of shares that were assigned. Afterwards I, in addition to the managing of The Jenne Creamery Company converted all of the assets and made as many collections as I could from the assets and paid off a large number of small notes and debts that they owed around the city and in that vicinity.

Q. To others than The Berlin National Bank?

A. Yes, quite a large number of others. There were ten or fifteen, I think, if I remember right. The Jenne Creamery Company, the corporation, had been doing business and having a bank account with The Berlin National Bank ever since it organized and took over the business of D. J. Jenne and Company. That was some time in the month of June, 1902, that must have been about the time this book (the bank book of Jenne Creamery Company) was started. D. J. Jenne and Company was a partnership. The Jenne Creamery Company must have been in existence the 1st of March 1902. At that time they did not have an account with The Berlin National Bank. This was the first time they deposited. Exhibit 11 contains all of the dealings of The Berlin National Bank with The Jenne Creamery Company up to Nov. 17th. Before October 1902 there was no difference in the account or the manner of doing business with the Jenne Creamery Company and The Berlin National Bank than there was after. Kept the account right along in the same way.

Q. Made their deposits——

A. From the proceeds of butter.

Q. Checks received from butter?

A. Yes. Before October as well as after. The business done in the name of The Jenne Creamery Company letters, correspondence, bills and everything. Before October the 1st, 1902, The Jenne Creamery Company drew checks for the payment of milk that had been received at the different factories from the different patrons just the same as I did afterwards. Just the same as these
115 checks that have been offered in evidence here. Afterwards we continued the business in just the same way and so far as the bank is concerned, there wasn't anything to show that there was any change in the business or way of doing business than before October the 1st 1902.

Q. When you speak in answer to Mr. Thompson's question as to working out the proportionate share of each patron's milk, now wasn't this the fact that after the Jenne Creamery Company sold the butter, to determine what they owed the different ones who had furnished milk, you simply worked out the proportion that the tests showed—the test of his milk showed he had furnished butter-fat that went into that butter?

A. Yes.

By PLAINTIFFS: Objected to as leading. He is a witness of one

of the defendant companies and even in cross-examination ought not to be led.

By the COURT: I think it is leading.

By DEFENDANTS: On behalf of the receiver it might not be leading. I am examining here for the receiver of The Berlin National Bank.

By the COURT: It is probably a leading question anyway.

By DEFENDANTS: I may have a right to ask leading questions on his account.

By the COURT: I think their interests are so nearly identical that it would be leading for the receiver if it is leading for the bank. The defendants, P. R. Earling, and The Berlin National Bank each except.

Q. What was the fact as to the Jenne Creamery Company paying for losses on this butter?

Objected to as incompetent, irrelevant and immaterial.

Overruled and exception.

A. Our practice was to make good any losses that were made on account of shipments. The practice of The Jenne Creamery Company was to make good to the patrons the losses; by losses I mean sometimes shipping butter in extremely hot weather would cause a depreciation; that depreciation we make good in a number of cases. Paid full price for the butter, although we didn't receive full price for it. I only speak from the time after Oct. 1st 1902. I don't know of any practice prior to that. This was done after that time. This book Exhibit 10 I got with the property of The Jenne Creamery Company after the signing of this contract and I continued that right along the same as it had been in the first place, the same as

116 I found it. After this butter was manufactured at the creameries under the manner in which we did business there, there was no way to determine what particular pound of butter belonged to any person who had furnished milk there. The milk all went into a vat and from that into a separator or rather as soon as received it went into a separator and the cream all went into one cream vat and into the churn together from all patrons. Samples of the milk were taken from each patron several times a month and were tested by the butter-maker to determine what proportion of the butter-fat each patron furnished in their milk. After we sold the butter we averaged the test for the month to each patron and ascertained the amount of butter-fat his milk furnished according to the test and from that, we determined how much to pay him from what milk he furnished.

Mr. THOMPSON: That last question isn't right, Mr. Niskern; he didn't determine from that the a'm't of milk he (the patron) furnished, but the butter-fats.

COURT: I think I understand that.

These little envelopes that were shown me, Exhibit 29, were for milk furnished up to Nov. 13th and the computation was based on all of the butter that I had sold up to the 15th—two days more.

Q. Then you were really paying for more than you owed?

A. Well those were not made you know under my direction. They were made after the bank closed and after the business was turned over to the Spring Lake Company.

(By the COURT:)

Q. I understood that the delay of two days was due to the making and shipping of butter?

A. They shipped Tuesdays, merely covered the milk up to the 13th and covered all shipments up to the 15th. In the month of November the patrons were supplying milk on Tuesdays and the 15th was Tuesday, that was the last shipment that was made under my direction; that included the milk up to Nov. 13th delivered to the stations. The milk delivered on the 15th, I had nothing to do with it.

Q. After the 1st of October 1902, did you have any talk with any of the patrons of these different stations like the Spring Lake and Mount Morris about shipping the butter? State whether or not you did or whether you continued the same as it had been.

A. I think there was nothing said at all on the part of the patrons. We continued the same as the Jennes had been doing, finding a market for the butter and selling it.

Q. And there never was any objection to your doing that?

A. Nothing was said by the patrons. We had no talk not that I remember of.

117 Q. Was there any talk by any of the officers of these different corporations from which The Jenne Creamery Company had leased factories?

A. Nothing said about marketing the butter. There was no other bond given than Exhibit No. 4 to any of these other local Companies. The money shipped up by The First National Bank of Chicago on the 17th of November to the Berlin National Bank was money ordered by the Bank the day previous by telegraph from the bank at Chicago. It was ordered to meet the obligations of The Berlin National Bank that were being presented. It was on our direct order by telegraph. We had on the books of The First National Bank, that is, on our running account, we had money due us that we could use.

Q. State whether or not before this time, The Berlin National Bank had borrowed some money of them?

A. The Berlin National Bank had borrowed during the fall of 1904 at different times, several amounts which aggregated at that time \$10,000.00. The \$10,000.00 was borrowed at different times and the proceeds of the notes that were given was placed to the credit of the Berlin National Bank with the understanding that The Berlin National Bank had the right to use that money or the credit as its business requirements demanded.

Q. Then what was this \$3,000.00 that was shipped from? What was it to come from?

A. In the course of several weeks' business, a bank's balance charges, the same as that of individuals change and of course it is

hard to tell whether it is part of any of the money borrowed then, or of the money which belonged to it; It was all mingled in with checks that we had sent them and remittances of various kinds. There were several notes which aggregated \$10,000.00, the last one was made, I think, a week or ten days before, it was a renewal note. The Berlin National Bank owed on the 17th of November to The First National Bank \$10,000.00. The balance to the credit—I mean on the open account of The First National Bank with The Berlin National Bank, amounting to nearly \$3,500.00, was applied in reduction of that amount by the Chicago bank. It was a collateral form of note which authorized them to make such a disposition. The amount to the credit of The Berlin National Bank on the books of The First National Bank was \$3,500.00. The amount to the debit of The Chicago Bank in the Berlin National Bank's books was \$1,700.00 or \$1,800.00 but there were outstanding drafts which increased the amount to the credit on the Chicago books.

On redirect examination the witness said:

Q. In other words, Mr. Brown, before you telegraphed The First National Bank of Chicago, you had a credit there of an amount according to their books of about \$6500.00, according to your books, some \$1700.00 less.

A. According to the way the thing shows now. We didn't know how many drafts were out. We knew we had a credit of nearly \$5000.00 there—\$4800.00 approximately.

Q. And on the 17th of November you received from them \$3000.00 about in currency which was charged on their books to you?

A. Charged to The Berlin National Bank. And the balance of the funds, as shown according to their books, after the failure, were applied by them on the payment of their notes. They had collateral for the \$10,000.00 note.

Q. Valuable collateral sufficient to pay the notes?

A. More than that. The notes we gave the Chicago bank were sixty and ninety day notes, not less than sixty days of different dates. This \$3,000.00 that our bank received on the 17th of November 1904, was received only a few moments or a half an hour or so before we closed, and, at that time there were numerous customers waiting and it was paid out very rapidly. It was laid on the counter as it came from the Express Company and a portion of it was immediately paid out.

Q. And part of it remained there?

A. I don't know whether it was a part of that money.

Q. Or money that it was put with?

A. I don't know, I am sure. There was some money obtained that same day from The First National Bank of Berlin, amounting to \$3,000.00 and we had some money in our bank on the morning of that day and the payments were made that day from those funds indiscriminately. At the close of the day, the bank still had on hand the sum of money which I testified in my examination before Mr. Wood. The remainder of the Chicago money, if any, was there

with the other funds, and kept the same as the others were, there was no distinction made. It was a part of the agreement with the patrons that the butter made should be good butter. I don't remember what the terms of the contract were. It was to be sold on the Elgin basis; The price of it was to be bargained on the Elgin basis.

119 It was classed as Elgin butter. In October 1902 when Mr. Jenne and Mr. Parrot came to see me, Mr. D. J. Jenne owed the bank \$2200.00 on his individual note and D. J. Jenne & Co. owed the bank \$5000.00 on two notes of \$2500.00 each. Parrot did not owe the bank anything. I don't remember if the Jenne Creamery Company had an over-draft. D. J. Jenne & Co. was a partnership: D. J. Jenne and E. H. Jenne. I couldn't tell without looking at the bank's books if the Creamery Company corporation had an over-draft there, then. In addition there were out-standing and unpaid a large number of checks given by the corporation. I only know how many from what Mr. Jenne told me and which I think proved to be right. They said, D. J. Jenne & E. H. Jenne—I think it was E. H. Jenne told me this, estimated the amount out-standing to be about \$5000.00. It over-ran their estimate according to the way results have shown. After this arrangement was made with the Jennes, those out-standing checks were presented and paid in the bank.

Q. I think you testified before—I will ask you if it is a fact—that the bank at this time was anxious to get as much salvage as possible out of the Jenne property private and corporate. .

A. Yes.

Q. You testified then, and I ask you if it is a fact, that prior to this agreement you had a special conference or two in which the Jennes presented the matter and the directors talked it over?

A. Well it was never submitted—

Q. I don't ask you if it was submitted to the whole body but to some of them.

A. Some of them. Mr. Stedman and myself talked it over and I think perhaps Mr. Foster. Well I don't remember. My testimony in regard to these matters given at Berlin was given truthfully and to the best of my knowledge at the time. No bond was ever given by me as a voluntary assignee nor any papers filed in the Circuit Court.

On recross-examination the witness said:

Q. You said a moment ago that you paid some claims against the Jennes after Oct. the 1st 1904, the date of this agreement. Do you remember about how large they amounted to.

120 A. Not exactly or perhaps very near. They amounted to several thousand dollars. That was for debts owed by both D. J. Jenne and D. J. Jenne & Co., that don't include The Jenne Creamery Company. I don't know where the milk sheets for October and November are now. I saw a batch of them over on the floor in the hotel there. The November ones I know nothing about.

MADGE STEDMAN, sworn for the plaintiffs, testified:

I was employed by Mr. Brown and the other persons managing The Jenne Creamery Co. Did not work for them before Mr. Brown was connected with it. I did the book-keeping, make out the checks and statements. Was regularly in the employ of those conducting the Jenne Creamery Company. I had the milk sheets and the test-book and the butter book. Exhibit 30 is the milk sheets that I had for October. I haven't got the test sheet now that I know of and do not know where it is. The butter book was the butter sold to the patrons I think. I haven't got that and I don't know where it is. Those were books and records of The Jenne Creamery Co. that came into my hand as book-keeper and from which I made out these statements. I think these statements for October, Exhibits 19 to 24 inclusive were made out by me while in the employ of The Jenne Creamery Company from these records, papers and books that I referred to. They show correctly the amount of milk delivered by each patron and the test and the amount of butter fat and the amount of butter which each patron purchased, I think from the factory. Exhibits 25 to 29 inclusive are the statements for the first half of November 1904, made out by me from the milk sheets, butter-book and test book, kept by the Jenne Creamery Company, during that time. I was authorized to do this work by the Spring Lake Company at this time but the books and records that I used were kept and used by The Jenne Creamery Company during the time they ran the business the first half of November. These statements so far as I know are correctly made from those books and correctly show the amount of milk furnished during the first half of November, the amount of butter-fat in it, the amount furnished by each patron and the butter-fat in it and the amount of butter purchased by each patron during that time. These statements were made by me for the first half of November and October in the usual course of business and the same as all prior statements were made and are to the best of my knowledge and belief correct. I don't know where the milk sheets, or butter book or test book which cover November are and don't know where the

121 books are with the exception of the milk sheets that cover October.

Q. You have looked for them have you?

A. They are not in my possession. I don't know now where they are.

Q. Can you produce any of them Mr. Niskern?

Mr. NISKERN: Why I can't unless Bert has got them. I don't know what I did do with them. I either sent them to the bank or else Bert took them. I don't know which. The milk sheets for October came to our house, I think from the Spring Lake people, I presume. This is the book I kept the final totals in. Everything was entered in it. This covers October and the first half of November. It wasn't finished as much as they wanted me to do it.

(Book identified by the Witness, marked Exhibit 31.)

This is a record book of the corporation, kept by me, showing the amount of milk furnished by each patron and the amount of

butter fat in the milk as determined by the test. It is from this, and the other records; that statements were made up. This book was kept in the regular course of business, the entries were made each month and it is the original entry made by me of these things, just and true, and in my hand-writing. I made out the checks and prior to October were enclosed in envelopes similar to these exhibits and sent to the patrons. I think no checks were enclosed in the October envelopes nor in the November ones. I worked for them two years.

Cross-examined the witness said:

I had a book with the amount of the butter sold to the patrons that each patron bought, then there was an account kept with each patron and he was charged up with what butter he bought and I haven't got that book. There was a book usually that the test was kept account of, in.

On redirect examination the witness said:

I am not positive but I think that Mr. Brown figured out the total amount received from the sales of butter for the month. The amount of milk and the butter-fat, I figured myself from the original record-books and that is correct of my own knowledge and the amount sold to different patrons I took from the book myself and that is correct of my own knowledge. I don't know who figured the November apportionment of the moneys among the patrons. I think it came from Spring Lake. That part wasn't mine but the other part was and I know it is correct. For illustration, take Exhibit 23, the first envelope the name of the patron, W. Burns, it bears "Cr. 227 lbs., of milk at test 4.3." That means that during the month of October W. Burns delivered 227 lbs. of milk, that tested 4.3/10%. That would mean that there was 9 7/10 lbs. of butter-fat, which is obtained by multiplying 227 lbs. of milk furnished by 4 3/10%. Those figures I prepared myself from the original record. I took the per cent per pound that some one else figured and made out and put down the amount that they were to receive according to that price. I think I also figured out from the original record book the total receipts of milk and butter-fat from all the patrons but the price was usually figured by Mr. Brown.

Mr. NISKERN (showing witness envelope): 4.69 where did you get that?

A. Why I think I averaged that myself.

I had the records showing the amount furnished by each patron in milk and the per cent of butter-fat in it and adding the amount of butter-fat in each patron's milk and adding the sum of butter-fat in all the patrons' milk, gives the total amount of butter-fat for the first half of November. I figured that much for myself and that appears on these statements but the price I didn't work out. That was worked out by somebody in Spring Lake in November and by Mr. Brown for October. I am not sure who worked the price out for November.

JOHN W. BROWN, recalled for plaintiffs, testified:

Mr. Emigh came to me several times and wanted the November figures, as I remember it, and I finally took them from the books and gave them to him. I figured out from the books the October and November butter and butter-fat as it had been reported to me and gave it to him to take to Miss Stedman.

MR. THOMPSON: I had Mr. Stedman subpoenaed and he is here to show that he hasn't got these books. I don't suppose there is any use in calling him if your Honor thinks that the statements under the circumstances should be received.

COURT: Well, I don't know as to that I am sure. I supposed it wasn't contested, that part.

MR. NISKERN: It is not contested by the Jenny Creamery Company, but the Berlin National Bank and the receiver of the Berlin National Bank know nothing about it, as they have set out in their answer: that is the reason I have been objecting to it on that ground.

COURT: Your objection has not been on the competency anywhere, it has been as to the materiality all the way through?

MR. NISKERN: Yes sir.

COURT: I don't see then that this other evidence that you speak of has anything to do with the case."

A subpoena together with the return thereon was filed July 12th, 1905, in words as follows:

STATE OF WISCONSIN,
County of Waushara, ss:

The State of Wisconsin to Bert Stedman, assignee of the Jenne Creamery Company:

We command you, personally to appear before the Circuit Court of Green Lake County, at the Court House in Dartford, in said Green Lake County, on Wednesday the 5th day of July, A. D. 1905, at nine o'clock A. M. of that day, to give evidence in a certain cause then and there to be tried, in which John Emigh and O. L. Atkins are plaintiffs and P. R. Earling, as receiver of the Berlin National Bank, the Berlin National Bank, Jenne Creamery Company and John W. Brown, are defendants, on the part of the plaintiffs;

And you are further commanded that at the time and place above named you bring with you and have there any and all books of account, records, vouchers, papers, milk sheets and other writings belonging or relating to the Jenne Creamery Company and relating to all transactions between the Jenne Creamery Company and its patrons.

Hereof fail not, at your peril.

Witness, Honorable Charles M. Webb, Circuit Judge at Wautoma, Waushara County, Wisconsin, this 1st day of July, A. D. 1905.

W. L. ROBERTS, Clerk.

STATE OF WISCONSIN,
Green Lake County, ss:

W. E. Cavanaugh, being duly sworn, says that he is an attorney at law residing in the City of Berlin, Green Lake County, Wisconsin; that on the 3rd day of July, 1905, at the City of Berlin, said county, he duly served the within subpoena on Bert Stedman, the person named therein, by then and there delivering to and leaving with him personally a true copy thereof and paying to him \$1.50 for one day's attendance and 80 cents for travel.

W. E. CAVANAUGH.

Subscribed and sworn to before me this 3rd day of July, 1905.

FRED R. PECK,
Notary Public, Wis.

My commission expires Oct. 15, 1905.

Witness fees:

Per diem	\$1.50
Travel .....	.80
	<hr/>
	\$2.30

Said notice to produce omitting the title being as follows:

SIR: You are hereby notified to produce at the trial of the above entitled action, all books of account, vouchers, notes, receipts and other papers relating to any and all transactions between the Berlin National Bank, the Jenne Creamery Company, its officers, agents, stockholders or managers, also, all books of account, records, vouchers, papers or writing showing the assets of the Berlin National Bank when it went into the hands of the receiver, also, all books of account, records, vouchers, papers or writings showing the financial transactions of said Berlin National Bank for a period of six months prior to the receivership thereof, also, all record books, minute books, account books, papers, records, canceled checks and writings belonging or relating to the Jenne Creamery Company.

Dated this 20th day of June, A. D. 1905.

E. F. KILEEN,
Attorney for Plaintiffs.

To Perry Niskern, attorney for the above named defendants.

Indorsed thereon was the following admission of service: "Service of a true copy of within notice is by me admitted this 20th day of June, 1905. (Signed) Perry Niskern."

Plaintiff filed its notices to produce all books & papers with the admission of service thereon.

Plaintiff offered in evidence Exhibits 19 to 29 inclusive.

The defendants Berlin National Bank and receiver P. R. Earling, each objected thereto as irrelevant and immaterial.

Counsel for defendants stating "I don't think that they are competent, but I don't care anything about that."

Objection over-ruled, defendants Berlin National Bank and Earling each excepted.

S. B. STEDMAN, sworn for plaintiffs, testified:

I know approximately what the out-standing indebtedness of the Jenne Creamery Company was in January when I took charge as assignee. It was something over \$14,000.00. The assets were approximately of the cash value of something about \$2500.00. I should judge the indebtedness is of long standing.

P. R. EARLING, sworn for plaintiffs, testified:

I am the receiver of The Berlin National Bank, appointed by the Controller of the Currency, Nov. 18th, 1904, and took charge of the property Nov. 20th. The bank was closed on the 17th. After it closed until I took possession a temporary receiver, Mr. 123 Proper, was in charge. He turned over the assets and property that came into his hands to me.

Q. And it is now in your hands and you still act as receiver?

A. Yes sir.

The bank was insolvent at that time.

Q. From your examination of its affairs, could you state of your own knowledge derived from such information whether it had been insolvent for some little time?

A. Well it depends on what you call insolvent.

The Controller takes charge of banks sometimes when a bank in the ordinary sense is not insolvent but simply when they have done some things contrary to law. A bank might be perfectly solvent and yet allow the cash reserve to run below a certain amount and then the Controller would close them up. I wouldn't be able to say in this case that the bank was really insolvent.

Q. Is it a fact that at the time you took possession the cash value of its assets was considerably less than the amount of its indebtedness.

A. That was the supposition of the department, I think all the funds in the hands of correspondent banks of The Berlin National Bank are all collected, except in the case of the Chicago Bank where they off-set some notes. And those funds together with the funds which were on hand when the bank closed, came into the possession of the examiner and threw him into my possession and were afterwards converted into money and deposited with the Treasurer of the United States, subject to the check of the Controller. Whatever checks came to my possession were converted into money. That fund was also placed on deposit with the Treasurer of the United States, subject to the check of the Controller. Whatever money is deposited with the Treasurer, is subject to the check of the Controller or paid out by me here by his order. That fund is still in the hands of the Controller.

I have paid these moneys to the Treasurer of the United States

in the course of my official duty as receiver, was obliged to under the law to deposit them with him.

By PLAINTIFFS' COUNSEL: I offer also the deposition of Mr. Earling.

By DEFENDANTS' COUNSEL: I understand all these depositions went in but we have a right to make objections to the materiality and competency of them, the same as though the questions were asked now.

Mr. THOMPSON: His testimony as to those checks might not be competent without the books; you don't want to insist upon—

COURT: No he doesn't mean incompetent because the witness isn't testifying but incompetent in the nature of testimony, as I understand Mr. Niskern.

124 By PLAINTIFFS' COUNSEL: You don't object because the books are not here?

By DEFENDANTS' COUNSEL: No not because it is not the best evidence.

The books were there when the testimony was given.

OLE OLESON, sworn for plaintiffs, said:

In 1904 I was President of the Marion & Mt. Morris Butter & Cheese Co. For 1904 I think the agreement that we had with the Company was made with Mr. Metcalf sometime in January but when the written agreement was made, I don't recollect. We understood Mr. Metcalf was the agent and foreman of The Jenne Creamery Co. He was out to our factory I think it was at the annual meeting when the stock-holders and patrons there met together. It was a meeting anyway of the patrons and stock-holders.

Q. Did he make any statement as to what the people running the creamery Co. would do in the way of making butter for the patrons?

Defendants objected as irrelevant, incompetent and immaterial. Overruled and defendants excepted.

A. Why yes. He told us that they would make it for the same price that they had the year before. That was $3\frac{1}{2}\text{¢}$ a lb. when butter was above 17¢ ; if it was below 17¢ they was to make it for 3¢ and some of the patrons objected to it dividing on 17¢ , thought it ought to be either 18¢ or 20¢ . Well Mr. Metcalf says: "I can't agree to that. You will have to see Mr. Brown." Some one of our officers, perhaps I did myself, wrote Mr. Brown in regard to the matter and there was a day set when Mr. Brown should be there and afterwards he came out there. I couldn't tell what he said when he came out there. I wasn't at that meeting.

Q. What did Mr. Metcalf say about Brown and Stedman and Foster in connection with The Jenne Creamery Co.?

A. Why Mr. Metcalf represented to us that they were the Company and also he represented to us, that Mr. Metcalf himself, had stock in the Company—that they were actually interested in the Company. After Metcalf's talk at that meeting, the patrons there continued to furnish their milk to that station to whoever was there for the Jenne Creamery Company to receive it.

Q. Now, under that agreement, state whether or not they were to market the butter.

Objected to by defendants, objection overruled, defendant excepted.

A. Take out their $3\frac{1}{2}\text{¢}$ a lb. and send the proceeds to 125 each of the patrons whatever their share might be of the proceeds. The understanding was, of course, that they would make good butter. I don't know that there was anything said in regard to poor butter—if they should stand the damage in case there was any poor butter—I don't remember anything about that. For this $3\frac{1}{2}\text{¢}$ per pound that they got, they were to make the butter, put the coloring in it, put it in tubs and tend to handling it.

Cross-examined the witness said:

It is my recollection that this was in January just about the time—that was the time that we had our annual meeting. The stockholders and patrons were there. I can't name them all but I can name a good many. There was Mr. Thorsteadt, Mr. Ellickson, two or three of the Selsings, I remember perfectly well that John Selsing was there and Nels. Anderson. I don't know as I can name any more and be certain about it. It was in the afternoon Metcalf came there with a team, a team that he usually drove I think when he was on the road for the Company. He was there a number of times, he was there then a good share of the afternoon. There was business done if it was the annual meeting, of course, the business of the annual meeting—. As I already stated, I don't recollect. I wouldn't state positively that it was the annual meeting. I don't remember—If it wasn't it was a special meeting.

Q. What was the first thing that you remember that Mr. Metcalf said?

A. They asked him in regard to what they would do, that is, for the coming year the price for making butter. I don't remember who asked him.

Q. You say he was there and had some talk?

A. Yes.

Q. Now, I am asking you what is the first thing that you remember that he said?

A. I don't remember what — the first thing that Mr. Metcalf said.

Q. I ask you what is the first thing that you remember that he said.

A. The only thing I can remember just now is, we was talking about the price of making butter. Mr. Metcalf got up and made the statement that they would do as they had done. That they would make the butter the same as they had the year before for $3\frac{1}{4}\text{¢}$ when butter was above 17¢.

Q. What was the first thing that Mr. Metcalf said as you remember it?

A. Why I don't remember any particular thing that Mr. 128 Metcalf said, only I do remember in regard to the price. He said there at that meeting that we would have to see Mr.

Brown. That was after we had talked about the price of making the butter, that he would not agree to anything of the kind that we would have to see Mr. Brown.

Q. Didn't he tell you then he didn't have power to agree to anything? You would have to see Mr. Brown?

A. Yes, that is below 17¢. You see we contended that they ought to divide on 18¢ or 20¢. He told me that they had stock in The Jenne Creamery Co., he did not say how much. He told me he didn't have very much. Told me so out in my field one time.

On defendants' motion all the conversation had with Witness in the field by Metcalf was stricken out and plaintiffs' excepted.

At that meeting he told me he had stock in the Company. I don't know as I could tell just exactly how it came in. In a meeting like that there is a good deal said.

JAMES LEIGH, sworn for plaintiffs, said:

I am the Secretary of the Seneca Cheese Factory Co.

Q. Did any representative of the Jenne Creamery Co. ever come out there in reference to an arrangement for making butter from the milk of the patrons in that factory?

A. Mr. Metcalf came out there. There was a meeting of the stockholders and the patrons. That was after Brown, Foster and Stedman appeared in the Company. Mr. Metcalf made a statement as to what they would do.

Q. What was it?

Objected to by defendants as irrelevant, incompetent and immaterial.

Objection overruled, defendants each excepted.

A. Well the first thing was in regard to a lease that a party from Chicago, Mr. Crosby, had and running it as a cheese factory and the lease wasn't out yet and if this was the only factory that Crosby had in that locality in that part of the State, and he didn't feel that he wanted one alone that way in regard to the market. He thought he'd better get rid of it, so he came up to Berlin and thought he would have the lease changed over. All that leads up to is, that The Jenne Creamery Co. succeeded to Crosby's lease.

Q. What was the arrangement that Mr. Metcalf stated they would make with the patrons in regard to taking milk and making butter and turning over the proceeds.

127 Defendants objected as irrelevant, incompetent and immaterial.

Objection over-ruled, defendants excepted.

Ans. Well they were to skim the milk and deliver it to their creamery at Spring Lake, make it into butter and see to the selling of it and the proceeds were to be divided by them to the different patrons. They said they would take as their pay for doing that work, the same as the other factories which was 3½¢. That's what Mr. Metcalf stated there at the meeting and after that the patrons furnished milk and the thing run along under that arrangement.

Cross-examined the witness said:

There was an agreement entered into by The Jenne Creamery Co. and the Seneca Cheese Factory Co. about the taking over of that lease in writing.

Q. Your Company entered into an agreement with The Jenne Creamery Co. as to making butter, in writing, at that time, didn't they? Answer that question Yes or No.

A. We had a verbal agreement, Yes sir.

Q. Didn't you understand my question?

A. I did not.

Q. I asked you if your Company at that time didn't enter into an agreement with The Jenne Creamery Company with reference to making this butter?

A. We had a written agreement, but I don't just remember just how—

Q. I didn't ask you that. You did enter into a written agreement with reference to making this butter?

A. Yes, we did. That was after this time that I have been talking about when Metcalf was out there two or three days, I think the same week anyway. The Company had one such agreement and there is one at home in my office. I have that written agreement that I speak of. When I say the Company had one, I mean The Jenne Creamery Co.

By DEFENDANTS' COUNSEL: I move to strike out his testimony in relation to the oral agreement they have been talking about, as there was a written agreement.

By the COURT: It may stand. I suppose the nature of this oral agreement was to get patrons to bring their milk in the nature of an inducement.

Defendants each excepted.

128 (Witness continued:) At that meeting there were several there almost all the stockholders and other patrons, not stockholders. Mr. Leshnack and Mr. Suelflow that wer-n't stock-holders were there. There isn't many patrons that are near by but what are stock-holders. There were two there so far as I remember.

LEROY W. TERRILL, sworn for plaintiffs, said:

I am the President of the Terrill Dairymen's Association.

Q. Do you remember the time that Brown and Foster and Stedman became interested in The Jenne Creamery Co.?

A. Well I couldn't say for certain just what time.

Q. The testimony in the case shows, I think, October 1902. Did Mr. Metcalf come out there to your place in regard to an arrangement for taking milk and manufacturing butter and dividing the proceeds?

A. Came out there in reference to renting the factory, the building. When he was there, there was the annual meeting of the stockholders and I think some patrons were there, not stock-holders.

Q. Did he make any statement as to what they would do?

A. Yes sir.

Objected to by defendants as irrelevant, incompetent and immaterial.

Objection over-ruled, defendants excepted.

Q. Just state briefly what it was.

A. He said that they would make just the same that Jenne has been making for us, the same rates.

Q. And what had they been previously making the butter for?

Objected to as irrelevant, incompetent and immaterial.

Objection over-ruled, defendants each excepted.

A. He said they would do just the same as Jenne had and they had been making for 3½ when it was above 16 and below 20 they would have 4¢, that is the contract they made, that is when it was above 20, and when it was below 16, they would make for 3¢, would sell and divide the proceeds. I don't think he told us that that was the arrangement with the other Companies.

Q. Well under this statement that he made there, did the stockholders and patrons go on and furnish milk.

A. Yes, up to the time the Company closed. Settlements made monthly until October 1904.

129 Q. State whether or not it was because of these statements made by Metcalf that the milk was delivered there by the patrons.

Objected to as irrelevant, incompetent and immaterial.

By the COURT: "He may answer if he knows."

Defendants each excepted.

A. Well I can answer from my own personal milk for certain. I was influenced by it.

Q. Well as an officer of the corporation there, that is the local Company, was it generally made known to the people that had milk that they were doing it on this basis and making butter for you?

A. Yes. He stated that Mr. Brown, Mr. Foster, Horace Stedman and himself was interested in the Company. He said he was interested in it and he voted the stock of the Company in the meeting as a member of the Company. I did not ever know that Stedman, Foster and Brown only had a nominal interest in the Company.

Cross-examined the witness said:

This talk was on the last Saturday of December 1903. My Company had no written contract. At that time, Mr. Metcalf represented himself as one of the Company and voted the stock that the Company held in our factory in the building as a member of The Jenne Creamery Company, that is, they hadn't changed the name. Well I wouldn't say positively that it was in 1903, but I think it was two years ago and that would make it 1903. He said he owned stock, was a stock-holder of the Company. It might possibly have been 1904. I don't think it was as far back as 1902. It was two years ago. It was before the bank closed. It must be in December 1903. At that time Mr. Metcalf said he was a stock-holder in The Jenne Creamery Co., that he was a member of the Company. I don't

remember that he said particularly that he was a stock-holder, but that he was a member of the Company and he voted the stock that the Company owned in our building.

Q. He said that?

A. He voted it. I wouldn't swear that he said he was a stock-holder. The Jenne Creamery Co. owned two shares of stock in our factory and Mr. Metcalf voted at the meeting. On the election of officers and all the other business and on the renting of the factory and on the proposition to put in a new floor. We had nothing but a verbal agreement with The Jenne Creamery Co.
130 nor with D. J. Jenne & Co.

On redirect examination the witness said:

Q. Now it was October 1st that Brown, Stedman and Foster became interested in The Jenne Creamery Co. Does that fact help you to fix the year that Mr. Metcalf was up there, whether it was 1902 that same fall or the next year.

A. Well I think it was the same fall that they commenced running.

On recross-examination the witness said:

Q. How did you know that they had commenced running?

A. Well our checks come that way. That's the first intimation that we had of it. The first checks the checks before were signed D. J. Jenne & Co. and after that Mr. Brown signed them.

Q. Don't you know that the Jenne Creamery Co. was organized and doing business long before the 1st of Oct. 1902.

A. Not of my personal knowledge. I couldn't swear to it. I know that that was the common talk but I never asked Mr. Jenne or knew anything about it positively. Before Oct. the 1st, 1902 not all of the checks were signed D. J. Jenne & Co. When they first ran, they were signed D. J. Jenne and after a while they were signed D. J. Jenne & Co. They were signed that way until the 1st of October 1902, I think. As I remember it none of the checks before the 1st of October 1902 were signed Jenne Creamery Co. and that's what makes me think that that was the time that Brown, Foster & Stedman were interested in it.

On redirect examination the witness said:

Q. When you say the checks were signed by Brown, you mean that they were signed as they are her- in these exhibits, practically? (Papers shown witness.)

A. Yes. And before that some Jenne or some Jenne's name or something of that kind was signed where the "Brown" is.

ANTON E. CLAPPE, sworn for plaintiffs, said:

I am President of the Black Creek station, in the town of St. Mary. I remember when Mr. Metcalf was up there. He was agent every time. He was lots of times on Jenne's place, then after that, in June 1903, I don't know what day, the 1st day in June he was there and he told me that Jenne sold out the station. He didn't tell me who

bought it. He told me Stedman was in and Brown, that's what he told me and he was the agent same as it was before. I asked
 131 him first, I say, "Mr. Metcalf how is it now, we got a contract with Jenne, if you said Jenne sold out, we got to make a new contract." He said, "It's no use; Brown is Cashier and Stedman is going to run it in Jenne's name." Then he told me the Company is better, you get a better chance now. Jenne was hungry. I say "Hold on, if Jenne was hungry, we was satisfied if we had to pay no more." "No," he say, "You have to pay the same price what you have before."

Q. For making the butter?

A. For making the butter. What we paid before I got it right here, my contract. This contract is one made in 1901, that was with the Jenne Co. before we built the building. It was the 27th of December.

Q. What was the arrangement there before Brown and Stedman and Foster were interested in the Company as to the Jenne Creamery Co. making butter for the patrons there? Did they do it?

A. Yes Sir. They got $3\frac{1}{2}\text{¢}$, we paid them for milk and what they sold belonged to the people. They returned the rest of what they sold to the people. We don't make butter then, we got to use a creamery station and the cream is going to Neshkoro and Neshkoro was a small station too, then the cream is gone over to Spring Lake from our place.

Q. Did Metcalf say anything to the effect that they would continue to make butter for the patrons and sell it and account for the proceeds just as they had before?

A. No use of talking, that's all what I know.

Q. Did Metcalf say it would go on the same as before?

A. Yes and they did it. The first day I sent the boy for me, that day I was home, I live pretty near and then some fellows come with the milk book and let me know I have to come and Atkins was there. There was lots of people there.

Q. As President of the local association, did you tell people what Metcalf said?

A. Yes, and they brought milk there afterwards, the same day and the day after and that same what he say to me, he says to Pete Warren, who is at the milk station.

Cross-examined the witness said:

(Paper shown witness.) I signed that. That was the contract I signed with The Jenne Creamery Co. with D. J. Jenne & Co.

132 Q. Do you know whether afterwards that contract was assigned over by D. J. Jenne to The Jenne Creamery Co.?

A. Nobody asked me that and nobody told me that. He told me just the same—I don't know whether it was assigned over by D. J. Jenne & Co. to The Jenne Creamery Co. This talk with Mr. Metcalf that I have told about was the first days in June 1903. Before that time, in 1903, I had taken milk to the skimming station all the while through May and June and April.

O. L. ATKINS, sworn for plaintiffs, said:

I was President of the Spring Lake Butter & Cheese Co.

Q. Do you remember of Metcalf's being up there after Brown and Stedman and Foster became interested in The Jenne Creamery Co.?

A. Yes, that was right after—it was right after the transfer was made—before—well I wouldn't say whether it was before the transfer was made or right at the time. Mr. Metcalf and Mr. Jenne—I being president of the Company—they came to my place and they said that, "We have assumed—Metcalf was up there at the annual meeting in January. The patrons and stock-holders, the most of them being present, Mr. Metcalf made statements there before the meeting.

Q. What did he state?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Defendants each excepted.

A. They made the statement that he would run the factory, the same as The Jenne Creamery Co. had run it before and assume our contract. There would be no need of another contract being drawn until their time was up. Before they charged them $3\frac{1}{2}\%$ when butter was 17¢ and above, when it was below, they charged them 3¢. The Jenne Creamery Co. bore all expenses that was to come out of the $3\frac{1}{2}\%$ and the net proceeds above that were to be divided amongst the patrons according to the amount of butter their milk brought that was delivered. He said that agreement would continue right along until our lease was out. Metcalf said that Mr. Brown and Stedman and Foster and himself was the Company. He says "I have not got much interest in it because I hav-n't got much money, you all know that." Those are the words that he used. After that meeting, the patrons continued to furnish milk and The Jenne Creamery Co. make it into butter and after deducting the $3\frac{1}{2}\%$ divided the proceeds as they did before up to the 1st of October 1904.

Cross-examined the witness said:

Metcalf said that he was interested in the Company, he didn't say that he was a stock-holder. He says that "I hav-n't got much money in it, I am not very largely interested because I hav-n't got much money, you all know that."

Q. When was this?

A. Well it was either—I wouldn't just say the day but Mr. Jenne, young Mr. Jenne—

By PLAINTIFFS' COUNSEL: What differences does it make what interest this man Metcalf had in the Company, whether he had anything or not?

Mr. NISKERN: I suppose they are trying to prove that he had some interest in it and was making these representations or statements as being represented in the company; I suppose it must be on that theory, that therefore he had authority to bind the company.

Mr. THOMPSON: No, my idea is this, Your Honor, was that Brown, Stedman and Foster, having no real interest, nevertheless through their agent held out to these people that they were interested in this concern, when that wasn't so as a matter of fact, they were only nominal parties and running it only for the bank, and showing what these people understood about it.

COURT: I don't see how it is material what interest Metcalf had in it or what stock he had in it or what stock the others had in it. I presume after Brown has testified that this man Metcalf was representing them that you have a right to show what he said as far as it concerned the company. I don't see what he said about his own interest cuts any figure, so I don't see the use of examining the man as to just what Metcalf said as to his own particular interest, whether it was little or big."

By the COURT: I don't see how it is material what interest Metcalf had in it or what stock he had in it or what stock the others had in it.

By DEFENDANTS' COUNSEL: We had objected and I understood the court to over-rule the objection.

By the COURT: I don't think there has been any objection as to what he said in his own interest.

Defendants and each of them except.

On redirect examination the witness said:

He said Brown, Stedman and Foster were stock-holders.

Q. Did you ever know that they only had a nominal interest?

A. I didn't know anything about it. I supposed they was until the examination at Berlin.

Recross-examination:

Mr. Metcalf told me about his having an interest in the Company just at the time they made the transfer. I don't know just exactly what day it was. I am pretty sure it was in the fall of 1902. I wasn't present when they made the transfer. He came to my place him and Mr. Jenne.

Q. That was before they made the transfer, wasn't it?

A. I don't know anything about that, when they made the transfer. I wasn't there.

Q. You answered that question "about the time they made the transfer?"

A. Because right after that—then Brown and them fellows run out and Mr. Jenne went away. This was before Jenne went away. Jenne was there.

Q. As you understood it, it was before there was any transfer—that it appeared there was any transfer to Mr. Brown.

134 A. Well I couldn't say as there was ever a transfer in the world.

Q. You say that it appeared that there was a transfer by Mr. Brown, that is the way you know there was a transfer.

A. Why yes.

Q. Now, this was before it appeared it had been transferred to Brown.

A. Yes, it appeared it had been transferred to Mr. Brown. That's what they told me that day.

Q. Who told you?

A. Mr. Metcalf.

Q. The day that he and Jenne were up there.

A. The day that he and Jenne were up there, Mr. Jenne didn't come where I was at all. This other talk I had with Mr. Metcalf at the time of the meeting was the 1st of January 1903. I am pretty sure it was. My Company at that time had a contract with The Jenne Creamery Co. providing for what the butter charge should be for making. At that time I don't think our Company had elected an officer to dispose of and sell the product. We had never elected a salesman before that. The Company elected a salesman last Spring, Mr. Marr, but it isn't the Jenne Creamery Co. now.

Q. Let me ask you, this is the agreement that your Company had made is it not, with the Jenne Creamery Company, Exhibit 5?

A. I know nothing about that contract. My name isn't on there. Mr. Marr was a member then, he was Secretary, I was President. On the 1st of July 1902, I did not make such an agreement with The Jenne Creamery Co.

Q. Your Company didn't?

A. Only just with the Secretary of the Company.

Q. Only just the Secretary signs, you mean?

A. Mr. Jenne came up and made that agreement with the Secretary, I was not at home. During 1902 before July, we furnished milk to this Jenne Creamery Co. We had a contract with them.

Q. Where is it?

A. Well it was before this contract Exhibit 5 was drawn. I think. That contract after this was drawn, I should think would be null and void then. I was not President of any other Company besides the Spring Lake Butter & Cheese Co. in 1902.

Q. Now look at this paper Exhibit 8, that's your signature 135 to that, isn't it?

A. Well I was Vice-president, I wasn't president then. This is the Mt. Morris & Marion Company. I signed Exhibit 3, an agreement between the Spring Lake Butter & Cheese Company with D. J. Jenne & Company, that's the partnership. I don't think we had another agreement with The Jenne Creamery Company. I wouldn't say as to that.

Q. Isn't that paper that I just showed you, Exhibit 2, the agreement?

A. Why it may be the agreement between the Company but I wouldn't swear that I had ever seen it before, because my signature isn't to it as the president.

Q. Well you understood that you had such an agreement as that?

A. I understood there was an agreement made, there was a contract made, but I couldn't swear that this was it. I couldn't say whether in July 1902 we were dealing with The Jenne Creamery Company.

Q. You didn't know who you were delivering it to?

A. We were delivering it to the Jennes.

Q. That's the only thing you knew of?

A. It was the Jenne Company. Whether it was the corporation or whether it was the partnership or whether it was an individual, I don't know anything about that.

Q. Then when Mr. Metcalf told you that they would go on making butter, as they had been doing, you didn't know whether he was talking about D. J. Jenne or D. J. Jenne & Co. or The Jenne Creamery Company.

A. No sir. He was talking about The Jenne Creamery Co. I can tell the Court what the agreement was there to the meeting but the contract was drawn afterwards, some time when Mr. Jenne came up and I wasn't present at the drawing of that contract. I think I furnished milk there during the months of July, August and September 1902. It was an operation and milk was brought there by different people, our stockholders and others. That was true in October, November and December 1902.

Q. So that you furnished those six months without having any agreement with The Jenne Creamery Company or Mr. Metcalf or anybody so far as you knew.

A. Only as they would run it right along just the same as The Jenne Creamery Company had been running it.

Q. There wasn't any Jenne Creamery Co. at that time that was running it.

A. Well it was the——

136 E. F. KILEEN, sworn for the plaintiffs, testified:

I am the attorney for the plaintiffs in this action and was acting for them some time before the suit begun. I made a demand on the receiver, Mr. Earling defendant in behalf of the plaintiffs for the moneys claimed in this action to be due them. I presented the claim to him down in Berlin before this suit was started. I saw him on two different occasions in regard to the claim. The last time that I saw him was—I had the summons and complaint with me but before I made any service of the summons and complaint, I made a demand on him for the amount that we claimed according to the statements.

By the COURT: Did he refuse to pay it?

A. He refused to pay it. He told me he wouldn't pay it. I had seen him before that and he also refused to pay it before that time. What he told me was, that as receiver of the bank he had nothing to do with the claims of The Jenne Creamery Company and he refused to pay them, disputed them entirely.

Cross-examined the witness said:

At the time I saw him the first time I offered to make any proper legal proof that he might want. He said that he didn't have anything to do with those claims at all. He said he wouldn't have anything to do with them. He said that the bank as receiver didn't have anything to do with The Jenne Creamery Company's claims. He told me he wouldn't have anything to do with it at all. The first

time I met him, was when you (defendants' counsel) were there in your office. Those claims were not assigned at that time.

Q. You were talking about the matter generally?

A. I represented all the patrons. Then there was a Committee came to see me from the Spring Lake factory, the factory where the butter was made. The second time was just before I served the summons and complaint. I served notices, I think instead of the complaint. At that time I stated how much I demanded. The total amount was \$2594.62. I told him that was the amount that I demanded that he pay over to me for Atkins and Emigh and he told me he wouldn't pay anything. At that time I told him that all these claims had been assigned to them.

Q. And he had a list of all the people to whom they had been assigned?

A. Yes. In fact there was a list attached to the notices that I served. But he didn't see that until after I had made the
137 demand. I didn't show that until after I had served the papers.

J. C. THOMPSON, sworn for plaintiffs, testified:

These sheets, Exhibits 32 and 33, are computations made under my directions and checked over by me so that I am confident that they are right as far as the figuring goes and they are made from the statements of the milk furnished and the percentage of butterfat contained therein as shown by these enveloped that have been offered in evidence, and the butter made from the milk, and the price obtained therefor, are taken from this shipping book of the Jenne Creamery Company, and the butter sold to patrons is also taken from these envelopes, and the computations are made on the basis of the statements contained in those envelopes and the books of the company and show the amount due to each patron of the proceeds to be distributed for the October sales and the sales the first half of November. I offer them in evidence.

Objected to as irrelevant, incompetent and immaterial.

Taken subject to the objection.

Exception by each defendant.

I offer in evidence Exhibits 34 to 43 inclusive, being assignments from these different parties to the plaintiffs.

Objected to as irrelevant, incompetent and immaterial.

Objection overruled. Exception by each defendant.

Testimony closed.

138 The deposition of John W. Brown and P. R. Earling taken before a Court Commissioner under Section 4096 of the revised statutes of Wisconsin Feb. 14th, 1905, is as follows:

EXHIBIT "A."

Said depositions were duly taken, certified to, signed and returned.

JOHN W. BROWN, being sworn, testified: I am the Cashier of The Berlin National Bank, have occupied that position since October, 1891, and during all that time have been a stock-holder and director. The capital stock of the bank was \$50,000.00 of which I held at different times different amounts,—during the last year \$10,400.00. The other directors during the last year or two were James H. Foster, J. L. Bellis, E. Grant Bunce, J. F. Koch, H. E. Stedman, William J. Middleton. I think that's all. B. F. Clark was a director before that. Up to some time in August James H. Foster was President. At that time he resigned and J. L. Bellis was elected in his place. Foster was President since the organization up until last August. As Cashier of the Bank I had what ordinarily falls on the cashier to do with the management of it no more so.

Q. Did you some years ago make some agreement with The Jenne Creamery Co.?

A. In what way.

Q. In regard to taking over the management of its property?

A. There was a writing entered into some time in the fall of 1902, I think. At that time the Creamery Company and the Jennes were borrowers of the Bank.

Q. Both the Bank and the individuals?

A. Yes, The Jenne Creamery Co. had an over-draft at that time. D. J. Jenne & Co. the firm were borrowers on notes and also D. J. Jenne personally. I don't remember much about the obligations of the creamery company.

Q. Have you an idea of about the amount of the total indebtedness of the corporation and the partnership and the individuals to the Bank at that time?

A. Why only in a general way. I remember that D. J. Jenne individually owed the Bank \$2,200.00 and that there was \$5,000.00 due the Bank from D. J. Jenne & Co. What the amount due the Bank from the creamery company at that time was, I don't know. I couldn't tell without refreshing my recollection by referring to the books.

Q. The Jennes were some-hat hard pressed at that time, were they not?

A. Why it appeared so from their statements to us at the time they made the contract or the agreement. It was a verbal statement. The statement, as I remember it, they asked me to come into the back room, the directors' room and they, Mr. E. H. Jenne and also his brother-in-law, Mr. Parrot, and they said to me that they regarded the firm as solvent if they could realize on their assets, able to pay what they owed but that under their management they were unsuccessful, they were failures in it and they thought it would be better to place the business in the hands of some one in whom they had confidence to liquidate it for them, take up the management of

it for them and if they couldn't do that, they would have to go into bankruptcy and they asked me if I would undertake the task of doing it for them. I called in the other directors and they made their verbal statements, that is about what they did.

Q. Do you remember what they were?

A. No, I don't, it was a good while ago, but I remember this they thought they had out \$5,000.00 in checks on the Bank which had not been presented by the patrons of their creameries they thought the property was worth \$8,000.00, thought it would yield a profit of \$2,000.00 a year and if it was liquidated, everybody would get their pay in full. Before that time, I personally had no interest with the Jennes.

Q. And their talk was had with you because you represented nearly all of the large creditors, wasn't it?

A. Yes, I suppose so.

Q. That is, they approached you as Cashier of the Bank.

A. Well, that was one reason and then they said they wanted a man whom they had confidence in.

Q. And the matter was talked over with you and the other directors of the bank, was it?

A. I,—there were some things yes. I called those that were convenient to me to listen to the statements of Mr. Jenne. The whole matter was done in my presence and as many as I could get. It was an informal meeting, it was not a regular meeting of the Board.

Q. Well the agreement entered provided for the payment of the Bank out of the proceeds of the business and out of the proceeds of the sale of the property, didn't it?

139 A. I don't remember just now; that is the written agreement you mean. I haven't seen it for some time, it provided for the payment of most all of the other creditors out of the proceeds, as I understood it.

Q. Do you know where that agreement is?

A. Mr. Niskern has it.

By Mr. NISKERN: Do you want it?

By Mr. THOMPSON: Yes, that is to say, I want something so that I can identify it.

Personally, I had no interest in the running of this business after making the agreement except a little work I did as well as I could. Whatever was done was done gratuitously. The funds of The Jenne Creamery Co. after that were kept at The Berlin National Bank.

Q. Did you take over the active management of the business of the Creamery Company after that?

A. I took over the clerical work and I employed Metcalf to look after the creameries at \$40.00 a month.

Q. But the running of the corporation was kept up by you after that?

A. The clerical work, I hired men that did the other work it was all under my direction.

Q. In pursuance of that arrangement, was the stock assigned to anybody? the stock of the corporation?

A. The stock was assigned to me, Mr. Foster and Mr. H. E. Stedman.

Q. Have you got the stock now?

A. It was turned over with the assets of the Company to S. B. Stedman, Mr. Foster and Mr. H. E. Stedman who received transfers of some of the stock were both of them directors of The Berlin National Bank, one of them president and one of them assistant cashier. After that arrangement Mr. Foster, Mr. H. E. Stedman and myself were the directors of The Jenne Creamery Co. I don't remember how much stock Stedman and Foster had. It was only assigned for the purpose of holding the corporation, that's about all to provide a Board of Directors to run it. I think the larger part of the stock was in my name, I think, I don't remember now, I couldn't tell without referring to it. At that time Mr. Foster had, I think, \$2,600.00 stock in the bank and Mr. Stedman \$1,000.00 or \$2,000.00, I don't remember which.

Q. Well after this arrangement was made you run the creamery business, did you not?

A. Yes.

Q. Did you have contracts with the different creameries or did you make some contracts with creameries after that?

A. There were some already in force and there were some that were renewals I think and I guess there were one or two that were made fresh, that is new ones. Whether they were all in writing or not, I don't know.

Q. Who had the stock assigned to Foster and Stedman, did you?

A. No, it was assigned by the Jennes, direct to them.

Q. Why was that done?

A. It was to preserve the corporation as I understand it.

Q. And assigned to them because of their connection with the bank, they had no personal interest in it.

A. No.

Q. They and you were anxious to save the Bank, isn't that it?

A. Yes, partly.

Q. Anxious to keep a good customer?

A. We didn't know whether we had a good customer or not.

Q. That is save it for the Bank not for yourself?

A. Yes we had no personal interest in it. I was Secretary in the creamery company, Stedman held an office and Foster was President. All of the stock outstanding was assigned to us three. Originally the creamery business was carried on by D. J. Jenne Co., a partnership and some time before I made that arrangement, I understood they had formed a corporation known as The Jenne Creamery Co. to take up the business and it was the stock of that company that I took over. This corporation, The Jenne Creamery Co. had leased certain creameries in the vicinity.

Q. Will you give the name of the creameries that you had leases of or assignments of?

A. There was the Spring Lake Butter & Cheese Co., Marion & Mt. Morris Butter & Cheese Co., then there was the Terrill Co., the Neshkoro, Germania, Black Creek and Red Granite. The original

leases or assignments are I think in the possession of Mr. S. B. Stedman, assignee. I presume they were sometimes made in duplicate. Exhibit D. being agreement between the Mt. Morris & Marion Butter & Cheese Co. and the Creamery Co. is one made after
140 the arrangement I spoke of. All these written leases were not substantially the same. There was some difference in the way butter was to be sold and some other little difference. Some terms about the building and like that. They were along the same line. They were originally made between Mr. Jenne and the Company but in nearly all of them there was a provision that the Creamery should charge a certain amount per pound for the butter made from the milk delivered, it depended on the price butter sold for. This in some cases was 16¢ and some 16½¢. There was also a creamery of which we had a lease known as the Seneca.

Q. I show you Exhibit "C" which is the original lease between the partnership and the Creamery there and ask you if that is one you worked under if you know?

A. There was such an agreement as that, I don't know if that is ours; if ours it had an endorsement on the back.

Q. You worked under that lease or a renewal of it?

A. Yes.

Q. And I show you Exhibit "B" which is a lease from the — Exhibit "B" is the new lease from that same Company to the creamery Company?

A. I don't know anything about that, there were several in that form this is apparently a new lease. Exhibit "A" is a bond from The Jenne Creamery Co. to the Marion & Mt. Morris Butter & Cheese Co. made while I was operating the business. There were no similar bonds to any of the others.

Q. After you took over the management were your managers instructed to explain the arrangement to the patrons, the change in the management and the new deal?

A. I don't think there was anything said, I gave no instructions except that the business was in my hands as successor, that is the Jenne assigned over their interest to us and we were operating the business for them. After the arrangement was made that we took over the Company I went out to the Marion & Mt. Morris creamery myself and had a talk there not with the patrons particularly, it was with the officers of the Creamery; there was four or five persons there altogether; they wanted to see us, wanted to have a talk with us about it. They had I think a contract there. They didn't want to make a contract longer than a year and their time was running out and they had overtures from some other Company and they wanted to see which would do the best by them, I suppose. They asked us to reduce the price of making butter which I told them we couldn't do and they said some of their patrons thought they ought to have some kind of security, a bond and I asked them if the Company's bond would be sufficient and they said it would and I told them I would send it up. The contract was to be for another year on the same basis as before. I don't think the bond made the matter any better; the bond practically promised to perform what

in effect had already — agreed to do the liability of the Company was not any different and the promises in the bond were not any different arrangement than I had before. This was in the Spring of 1904, I think in April.

Q. Well under these various leases you run the Company, took the milk and made butter and sold it and paid them the proceeds less the percent per pound for making it, didn't you?

A. Yes.

Q. Up to what time did you settle up with them?

A. All settlements were made at the same time. They were all paid up to the 1st of October.

Q. The October checks were in the course of preparation at the time the Bank closed?

A. Not the checks but the statements; that is, the young lady we employed was working on them. The Bank closed the 17th of November 1904 and the Creamery Company stopped doing business the same time.

Q. Well did you sell the butter product that was manufactured in October and November last year?

A. Yes in October, not in November; in October and a part of November; sold it to Thos. C. Jenkins of Pittsburg, Penn., S. Ewart & Co. I do not know how many shipments to them there were during October and November. The books showing that are in the possession of Mr. Stedman as assignee. That butter was shipped from Spring Lake.

Q. It has all been paid for, hasn't it?

A. All that I had anything to do with.

Q. That is October and part of November up to the time the Bank closed?

A. Yes.

141 Q. When did the Company shut down running the creameries?

A. I want to make an explanation before I answer that question. The last shipment that I had anything to do with for The Jenne Creamery Co. was made on the 15th of November. The bank closed on the 17th of November and the next day I think I was called up by some of the Spring Lake officers. They said they had a meeting of the Board of Directors and they wanted to know what they were going to do and I told them if they saw fit to do so they could make thier own shipments and make returns to the patrons for what they got for it. The other Companies did not do that that is the only thing I had to do with it. The butter was all made at Spring Lake, I have not had anything to do with the operation of them since the Bank closed. I don't know how many shipments of butter were made from the 1st of October to the 1st of November. Shipments were made every Tuesday and occasionally an intermediate shipment was made where they were not able to supply the entire order on Tuesday but they were always made as of Tuesday of each week and we made shipments in every Tuesday in October and the first, 8th and 15th of November. The shipments of the 1st of November would be October butter.

Q. How were these shipments paid for in October and November?

A. The customer always sent his check or New York drafts. There is a record of these on the memorandum on the shipping book. Plaintiff's Exhibit "E" is a statement of butter shipped and parties buying it.

Q. Will you read the shipments, the entire record of shipments that have not been settled for with the patrons?

A. Oct. the 11th 600 lbs. $20\frac{1}{2}\epsilon$, \$123.00, S. Ewart & Co. paid Oct. 24th by New York draft. Next shipment Oct. 18th, 600 pounds $21\frac{1}{2}\epsilon$, \$129.00 paid Oct. 29th by New York draft. Next shipment on the 20th there was shipped 366 pounds, 200 pounds at $21\frac{1}{2}\epsilon$, 166 pounds at $20\frac{3}{4}\epsilon$ for which we got \$77.50 on the 2nd of November in New York draft on New York. The next shipment 643 pounds, 269 pounds at $21\frac{1}{4}\epsilon$ 374 pounds at 22ϵ for which we received \$139.45 on the 5th of November by New York draft. Nov. 8th that's November butter 400 pounds at $25\frac{1}{2}\epsilon$ \$102.00 for which we received \$102.00 on the 17th of November by New York draft. Nov. 15th 320 pounds at $25\frac{1}{2}\epsilon$ \$81.60 for which we received \$81.60 on the 28th of November by New York draft. On Oct. the 11th we shipped to Thomas C. Jenkins, Pittsburg, 1,734 pounds, 1239 pounds at $19\frac{1}{2}\epsilon$, 495 pounds at $19\frac{3}{4}\epsilon$ less deduction for excess freight \$2.80 for which we received \$336.57 on the 24th of October in his check on some bank in Pittsburg. On Oct. 18th we shipped 1653 pounds, 1155 pounds at $20\frac{1}{2}\epsilon$, 4981 pounds at $20\frac{3}{4}\epsilon$ less freight \$2.60 for which we received his check for \$337.50 on the 31st of October, Pittsburg check. Oct. 25th we shipped 1735 pounds, 1228 pounds at 21ϵ , 507 pounds at $21\frac{3}{4}\epsilon$ for which we received \$362.62 on the 5th of November by check on Pittsburg. On Nov. 1st we shipped (October butter) 1293 $\frac{1}{2}$ pounds 1419 $\frac{1}{2}$ pounds at 22ϵ 504 pounds at $22\frac{3}{4}\epsilon$ less \$4.07 freight and overcharge for which we received a check for \$429.00 on the 14th of November. November the 8th was a divided shipment of October and November butter; we shipped 505 pounds of October butter at $24\frac{3}{4}\epsilon$ and 1423 pounds of November butter at $24\frac{1}{2}\epsilon$ for which we received a check for \$470.62 on the 22nd of November, they deducting \$3.00. On the 15th of November we shipped 1555 $\frac{1}{2}$ pounds for which we received a check of \$257.69 on the 28th of November, 618 pounds at $24\frac{1}{2}\epsilon$ and 437 pounds and a half at $24\frac{3}{4}\epsilon$ less \$2.00 deduction. I don't know anything about the receipts after that.

Q. Well on the book there are some other entries of shipments and receipts, do you know who made them?

A. I made them from memoranda that were sent me by the butter maker at Spring Lake. We shipped from Spring Lake. The subsequent entries below the line on page 54 relate to the running of the creameries by the Spring Lake people. The Bank examiner took possession on the 19th of November. I think we got a telegram from the Comptroller on the 17th that the Bank had been placed in the hands of L. H. Parker Bank Examiner and directing us not to do anything with the business after receipt of that telegram. I received that in the afternoon or evening some time.

Q. What was done with the drafts or checks received on the 17th?

— On the 17th of November I don't remember what was paid that day the creamery Company's account was over-drawn, it was placed to the credit of that overdraft. A. It was applied
142 on that over-draft by the examiner. During this time there were two shipments of butter to George Middendorf Company of Chicago in October. The first shipment in October was divided, 217 pounds shipped to Middendorf Company at 19½¢ which netted \$23.21 that is October butter.

Q. And the other shipment under date of Oct. the 4th of 428 pounds is September butter?

A. That is not correct, I have made a mistake in that, it couldn't have been 217 pounds at 19½¢, could it. The total receipts from the October butter in that shipment of Oct. the 4th was \$22.21. There was a shipment on Oct. 11th of 854 pounds which netted \$163.29 at 19½¢ per pound, we got the returns for the shipment of Oct. the 4th on the 10th of October in a check on Chicago and from the shipment of Oct. the 11th on October the 17th in a Chicago check. I don't know whether the shipment of October the 4th to Thomas C. Jenkins of 506 pounds was part of it October butter. I should think from this memoranda that it was not, the reason that is divided is that there are 60 pound tubs and they are marked September and the others not marked. On the same day some of the butter shipped to Middendorf was October butter. I couldn't really tell not without referring to the statement of the butter maker. That statement is possibly on the desk there in the bank belonging to D. J. Jenne. The bunch of statements on the outside of little envelopes marked plaintiff's Exhibit "F" F. 1 to F. 30 inclusive shown me are in the form of statements that we made the patrons, I never saw them before, I don't know anything about their correctness. In the usual course of business we delivered statements like these to the individual to show them what they had coming.

Q. And these would be the statements for these people for October?

A. I can't identify them, I don't know whether they are or not, I have never seen them, have not compared them. Madge Stedman prepared them. After she prepared them she usually brought them to us and the checks were issued and placed in them always placed in them and sent out to the customer. She was in our employ when she made these and I told her to make them up. I do not know to whom she gave these, I never saw them till now. Exhibits G. 1 to G 8 inclusive H. 1 to H. 25 inclusive I. 1 to I. 28 inclusive J. 1 to J. 23 inclusive K 1 to K. 29 inclusive L. 1 to L. 26 inclusive M. 1 to M. 25 inclusive N. 1 to N. 26 inclusive O. 1 to O. 27 inclusive are P. 1 to P. 23 inclusive shown me are the same envelopes which we furnished her and in her hand writing, she hardly made those while in our employ because I turned over the business to the Spring Lake Creamery Co. and never considered her in the employ of The Jenne Creamery Co. when she began working for the Spring Lake Creamery Co.

Q. Do you know when she began work on them?

A. We began to make our statements along about the 15th before

we commenced figuring on it, we would have to know the amount of milk or butter sold etc.

Exhibit 2 is one of the leases with the Seneca Butter & Cheese Co. which was assigned over to the Creamery Co. after I took hold of it. It is the same one.

Plaintiff's Exhibit Q is as follows:

This agreement made and entered into this 26th day of March A. D. 1903 by and between the Jenne Creamery Company, a corporation of the state of Wisconsin, party of the first part, and the Seneca Cheese Factory Company a corporation of said state of Wisconsin, party of the second part,

Witnesseth: that whereas the said Jenne Creamery Company has acquired by assignment, and with the consent of the party of the second part the annexed lease and contract dated January 6, 1902, made and entered into by and between the party of the second part and D. S. Crosby and the said party of the first part is now bound to execute and fully perform said contract and agreement as fully and to the same extent that the said D. S. Crosby is therein bound and has been substituted in said contract for said Crosby and whereas the said parties desire to make the change and alteration in said lease and contract hereinafter set forth,

Now Therefore in consideration of the premises and for value received it is agreed that the said party of the first part shall place and maintain in the factory building described in said lease whenever requested by the party of the second part a separator having a capacity to separate twenty-five hundred pounds of milk per hour together

with all the necessary equipment and machinery for operating
143 the same and shall maintain and operate such separator at said factory whenever and for such time as the party of the second part shall require during the term of said lease: Provided unless otherwise agreed, on month's notice shall be given to said first party of such desired change.

In witness whereof the said parties of the first and second part have caused these presents to be signed by their respective presidents and secretaries this 26th day of March, 1903.

JENNE CREAMERY COMPANY,
By JAMES H. FOSTER, *Its President*,
JNO. W. BROWN, *Its Secretary*.

In presence of

HORACE E. STEDMAN.
FRANK METCALF.
JOHN J. WOOD, JR.
WM. F. ZUEHLKE.

SENECA CHEESE FACTORY
COMPANY,
By JULUS WOBSCALL, *Its President*,
JAMES LEIGH, *Its Secretary*.

For value received the Seneca Cheese Factory Company, a corporation of the town of Seneca, in Green Lake County, Wisconsin, has and does agree and consent that D. S. Crosby the lessee and party of the second part named in the annexed contract made and entered into by and between the said corporation and the said Crosby and bearing date January 6th, 1902, may assign and transfer the said lease and contract and all his rights and interests therein to Jenne Creamery Company and upon said assignment and transfer being made and duly accepted by said D. S. Crosby.

The said Seneca Cheese Factory Company has and does hereby release and forever discharge the said D. S. Crosby of and from all further liability to the said corporation on the said contract and lease and the said contract and lease shall from thenceforth become and be as to said Crosby null and void but the same shall be a valid and binding contract with and against the said assignee.

In witness whereof the said Seneca Cheese Factory Company has caused these presents to be signed by its president and secretary this 26th day of March, A. D. 1903.

JULUS WOBSCHALL, *President.*
JAMES LEIGH, *Secretary.*

In presence of
JOHN J. WOOD, JR.

Copy.

Annexed thereto is the following:

This Indenture, Made this 6th day of January, 1902, by and between the Seneca Cheese Factory Company a corporation of the Town of Seneca Green Lake County, Wisconsin, party of the first part and D. S. Crosby of 201 and 203 South Water Street, Chicago, Illinois, party of the second part.

Witnesseth:

That the party of the first part does hereby lease, demise and let unto the party of the second part the factory building of the party of the first part, located in the Town of Seneca aforesaid, together with the lands and premises on which the same is situated and all machinery, utensils and other equipments of their said factory and therein contained or used in connection therewith:

To hold for the term of three years from the first day of March, A. D. 1902, with the privilege of two years thereafter, provided the notice hereinafter provided for is given, the lessee yielding and paying therefor the annual rent of one hundred twenty-five dollars, to be paid in even and equal portions, quarter yearly during said term, the first payment to be made June 1st, 1902.

In the event the lessee shall elect to continue this lease for the term of two years after the first three years herein provided for he shall give the lessor notice in writing of such election not later than December 1st, 1904, and failing to give such written notice this lease shall cease and terminate on the last day of February,
144 A. D. 1905.

The lessee does promise to pay the rent at the time and

in the manner aforesaid during the continuance of said term and not to under lease or assign the said premises or assign this lease without the consent of the lessor and to deliver up the same to the lessor or to its attorney peaceably and quietly at the end of said term and also to keep the same in as good repair as the same are at the commencement of said term, reasonable use and wearing thereof and damage by fires or other accident not happening through the neglect of the lessee only excepted and that the lessor may by its duly authorized officers and agents enter and view the premises at all reasonable hours.

And it is further agreed that if at any time during said term said factory building shall be destroyed by fire than and in that event this lease and this contract shall thereupon and thereby cease and terminate but in case of the destruction of said factory by fire during the term of this lease and contract, if the lessor shall replace the same by a new factory and machinery, then this lease and contract shall be in force during the remainder of the period covered hereby.

If the lessee shall fail to pay the rent aforesaid at the time expressed in this lease or shall under lease the said premises or assign this lease without consent of the lessor then the lessor may expel the lessee from the premises forthwith.

The lessor also agrees that it will not during the term of this lease and contract sell, convey or otherwise dispose of the premises or property hereby leased.

And it is further agreed that the said D. S. Crosby shall during the whole term of this lease and contract manufacture into cheese for the said lessor at and in said factory all the milk which the said lessor shall deliver or cause to be delivered at said factory to be manufactured into cheese during the cheese making season of each year during the term of this contract and lease, provided that the said D. S. Crosby shall have full right to reject any milk which may be tendered or delivered to him at said factory to be manufactured into cheese if he deems said milk not suitable to be manufactured into good cheese. Said Crosby hereby agrees to furnish all necessary supplies for the manufacture of cheese.

The said Crosby hereby agrees and contracts to and with the said party of the first part that all the cheese so to be manufactured by him during said term shall be good merchantable cheese and that the same when offered for sale shall command and bring the ruling market price for good merchantable cheese of the kind commonly known as "Twins" in the Fond du Lac market, at Fond du Lac, Wisconsin (on the basis of cheese to be delivered free on board cars at Berlin, Wisconsin).

And the party of the second part agrees to pay to the said Crosby for the manufacture of said cheese one and one-fourth cents for each pound of cheese so made, provided that said first party reserves the right to retain the price to be paid for the manufacture of the cheese for any month until after the cheese for such month has been sold and the returns received. And if there are any losses in the cheese for such month, short weights excepted, the same shall be

deducted from the price to be paid said Crosby for manufacturing the same.

It is agreed that the party of the first part may determine for itself the weight of the cheese so to be manufactured by actual weight thereof from time to time.

It is further agreed that if any of the machinery, utensils, equipments of said factory shall be worn out and new machinery, utensils or equipments be required to manufacture said cheese as aforesaid the same shall be furnished and provided by said Crosby, he to have the right nevertheless to remove such machinery, utensils and equipments as he shall himself furnish or provide.

The cheese so to be manufactured shall be delivered to the said Seneca Cheese Factory Company at and in said factory ready to be marketed and the first party shall draw the same to Berlin, Wisconsin for shipment.

The expense for all sales of cheese and of all computations in relation thereto shall be borne by the Seneca Cheese Factory Company.

145 In Witness Whereof the said Seneca Cheese Factory Company have caused these presents to be signed by its president and secretary and the said D. S. Crosby has affixed his signature hereto the day and year first above written.

LOUIS KOLPIN,
President.

JAMES LEIGH,
Secretary.

D. S. CROSBY. [SEAL.]

In presence of,
JOSEPH SCHERMER.
JOHN J. WOOD, JR.

Correct
WM. J. MIDDLETON,
Chairman.

Endorsed on the back of which was the following:

For value received I do hereby sell, assign, transfer, set over and convey unto Jenne Creamery Company, a corporation of the state of Wisconsin, the within lease and all profit and advantage to arise therefrom and I shall not be liable to said Jenne Creamery Company or to any other person on said contract and lease from this time forth. All liability of the undersigned being hereby assumed by said Jenne Creamery Company.

Witness my hand and seal this 26th day of March, 1903.
D. S. CROSBY. [SEAL.]

In presence of,
WM. F. ZUEHLKE.
JOHN J. WOOD, JR.,

The Jenne Creamery Company a corporation of the state of Wisconsin for value received has and does hereby accept the above transfer and assignment of the within lease and does hereby agree and

bind itself to do and perform each and every act and thing which said D. S. Crosby therein agreed to do and perform for and during the term of said lease and hereby assumes all liability of every kind which heretofore by reason of said lease rested upon or might accrue against said Crosby pursuant to said lease and agrees to hold and save him harmless therefrom.

In witness whereof the said Jenne Creamery Company has caused this agreement to be signed by its president and secretary this 26th day of March, 1903.

JAMES H. FOSTER,
President.
JNO. W. BROWN,
Secretary.

Witnesses:

HORACE E. STEDMAN.
FRANK METCALF.

Seneca Cheese Factory Company
and
D. S. Crosby.

Lease.

Mr. Thompson, I desire to offer Exhibits "W" "2" "Z" "V" "T" and "Y" so that they will appear in the record.

Exhibit "W" is as follows:

This Agreement made this seventh day of March, A. D. 1902 by and between The — of the Town of Marion, Waushara County, Wisconsin, party of the first part and Jenne Creamery Co. of Berlin, Green Lake County, Wisconsin, party of the second part, witnesseth:

The party of the first part does hereby lease, demise and let to the party of the second part, the building to be erected by them in the Town of Marion, Waushara County, Wisconsin at a point known as Olson's Corners, together with the boiler and fittings which they agree to place in said building for the period of one year from the completion of said building and installing of said boiler, to
146 be operated by the party of the second part as a skimming station during such portion of the year as enough milk shall be brought to the said station to pay running expenses. The party of the second part hereby agrees to make the butter for the patrons of the stations for the same as they charge the patrons of their other creameries and skimming stations, namely three and one half cents per pound of butter when butter shall sell for seventeen cents per pound or over and three cents per pound when it shall sell for less than seventeen cents per pound. The party of the second part agrees to pay all running expenses of the station, including transportation of cream to the creamery.

The party of the first part hereby agrees to furnish sufficient water to run said station during the term of this lease. The party of the first part hereby agrees to build a foundation suitable to place engine thereon.

The party of the second part hereby agrees to pay the party of the

first part an annual rental of an amount equal to 10% on the total amount invested in building and machinery. Provided the amount of milk brought to said station at one cent per one hundred pounds shall amount to more than 10% on said investment, then the party of the second part hereby agrees to pay rental on a basis of one cent per each one hundred pounds of milk delivered to said station during the year. The party of the second part hereby agrees to keep boiler in good running order; also other machinery rented from part of first part, that is make such repairs as shall be caused by ordinary wear and tear, or carelessness on the part of their employees.

It is further agreed that the party of the second part shall furnish pipe, rods and cylinder, also pump stand for use in well, and that if the party of the second part shall vacate said station the party of the first part agrees to buy the above named fittings at cost price.

WILLIAM JARVIS, *President.*

O. L. ATKINS, *Vice President.*

JENNE CREAMERY CO.,

By E. P. JENNE, *Sec.*

Witness:

— — —

Exhibit "2" is as follows:

This agreement made this first day of July A. D. 1902 by and between the Spring Lake Butter and Cheese Co. of the Town of Marion, Waushara County, party of the first part and Jenne Creamery Co., of the city of Berlin, Green Lake Co. party of the second part.

Witnesseth: The party of the first part does hereby lease demise and let to the party of the second part, their successors, and assigns the following described buildings and premises:

Creamery building, including living rooms above, Ice House and $\frac{1}{2}$ acres of land located in Town of Marion, Waushara Co., of Wisconsin, together with the land adjacent thereto owned or controlled by them. The party of the second part hereby agrees to pay an annual rental of one hundred thirty-four dollars and the party of the second part does further agree that if the amount of milk delivered by the patrons to this factory during the year shall be more than this sum, figured at one cent per each one hundred pounds of milk delivered, then the party of the second part does hereby agree to pay a rental based on amount of milk delivered.

This lease to continue for a period of three years from July 1st 1902, rent to be payable on the 1 of July and 1st Jan. each year, commencing July 1st, 1903, $\frac{1}{2}$ each payment.

The party of the first part hereby agrees to furnish the party of the second part sufficient water to operate the factory during term of this lease, also to keep the building in repair.

The party of the second part hereby agrees to operate the factory as a butter factory or skimming station during such parts of each year as sufficient milk shall be brought to pay running expenses. The party of the second part hereby agrees to make the butter for the patrons of this factory for three and one half cents per pound

when butter shall sell for seventeen cents or over and three cents per pound when it shall sell for less than seventeen cents.

147 The party of the second part shall bear all operating expenses including transportation of cream.

SPRING LAKE BUTTER & CHEESE CO.

_____, *President.*

R. J. MARR, *Secretary.*

JENNE CREAMERY CO.,

E. P. JENNE, *Secretary.*

Witness:

_____.
_____.

Exhibit "Z" is as follows:

This agreement made this 27 day of Dec. 1901 by and between the Black Creek Dairy Ass'n of the Town of St. Marie, Green Lake Co., Wisconsin, party of the first part and D. J. Jenne & Co., of the city of Berlin, Green Lake Co., Wis., party of the second part.

Witnesseth: The party of the first part does hereby demise lease and let the party of the second part the building to be erected by them in the Town of St. Marie and the land adjacent thereto belonging to them, together with the boiler and fittings to be located in said building. Said lease to continue three years from date 27. The party of the first part hereby agrees not to charge the party of the second part any rental for the first year, after that time the party of the second part does hereby agree to pay the party of the first part an annual rental of an amount equal to 10% of the total amount invested in the building and boiler.

The party of the first part hereby agrees to furnish the party of the second part sufficient water to run the factory during the term of this lease also to keep the building and boiler in repair except such repairs to boiler as may be made necessary by ordinary wear and tear, same to be made by the party of the second part.

The party of the second part hereby agrees to operate the said factory as a skimming station during such parts of each year as enough milk shall be delivered to the factory to pay running expenses.

The party of the second part hereby agrees to pay all running expenses of said station, including transportation of cream to butter factory and charge the patrons the same price for making butter as they charge at their other factories, namely three and one half cents per pound of butter, when said butter shall be sold for above sixteen cents per pound and three cents per pound when it shall sell for less than sixteen cents per pound.

(Signed)

ANTONY KLAPPA.
LAWRENCE MASHODA.

Witness:

ANTON MAJCHVSAK.
JOSEPH CODA.

Endorsed on the back of which is the following: For value received we hereby assign and convey to Jenne Creamery Co. all our interest in within contract. March 1st, 1902. D. J. Jenne & Co.

Exhibit "V" is as follows:

This agreement made this 26th day of June 1903 by and between the Marion & Mt. Morris Butter & Cheese Co. of the Town of Marion, in Waushara County, Wisconsin, party of the first part and the Jenne Creamery Company of the city of Berlin, Wisconsin, party of the second part.

Witnesseth: The party of the first part does hereby lease, demise and let unto the party of the second part, their successors and assigns the building and premises known as Marion & Mt. Morris Skimming Station, together with the boiler and other appurtenances thereto belonging, the property of said first part, situate at Olson's Corners, to have and to hold the same for the term of one year from the 12th day of May, 1903, the said lessee paying as rent therefor the sum of fifty dollars per annum, the first payment to be made on the 12th day of May 1904 and the subsequent payments annually thereafter.

The said party of the second part does further agree to operate said property as a skimming station during such portions of the year as enough milk shall be delivered at said station to pay operating expenses. In the event of the quantity of milk which shall be delivered at said station, shall be sufficient, figured at one cent per hundred pounds, to amount to more than the above rental during any one year, then and in such case the annual rent shall be the

amount which, calculated at one cent per hundred pound- of
148 milk delivered as aforesaid, the said milk shall equal. The party of the second part further agrees to charge the patrons of the station three and one-half cents per pound for the butter made from the milk delivered at said station, when butter shall sell for seventeen cents or more per pound and three cents per pound when it shall sell for less than seventeen cents per pound.

The party of the first part hereby agrees to furnish the party of the second part sufficient quantity of good water to successfully operate said station during the term of this lease. Also to keep the boiler in repair, except such repairs as shall be made necessary by ordinary wear and tear or the carelessness of the said party of the second part or employees.

The party of the second part agrees to pay all operating expenses including transportation of the cream to the creamery and to deliver up the premises herein mentioned in as good repair and condition as the same are now, ordinary wear and decay and damage by the elements excepted.

In witness whereof the said parties have hereunto caused these presents to be executed on the part of each company by the officers of said companies respectively, duly authorized, the day and year first above written.

MARION & MT. MORRIS BUTTER &
CHEESE CO.,

By WILLIAM JARVIS, *Pr's't.*

JENNE CREAMERY CO.,

By FRANK METCALF, *Mang'r.*

In presence of
J. MARKS.

(Notation in lead pencil: Separate bond 1000.)

Exhibit "T" is as follows:

This agreement made this 6th day of July, 1901 by and between The Neshkoro Dairy Association of the Town of Neshkoro, Marquette County, Wisconsin, party of the first part and D. J. Jenne & Co. of the city of Berlin, Green Lake County, Wisconsin, party of the second part.

Witnesseth: The party of the first part does hereby demise, lease and let to the party of the second part the building erected by them in the Town of Neshkoro and the land adjacent thereto, belonging to the-, together with the boiler and fittings located in said building. Said lease to continue for three years from date. The party of the first part hereby agrees not to charge the party of the second part any rental for the first year, after that time the party of the second part does hereby agree to pay the party of the first part an annual rental of an amount equal to 10% on the total amount invested in the building and boiler.

The party of the first part hereby agrees to furnish the party of the second part sufficient water to run the factory during the terms of this lease, also to keep the building and boiler in repair, except such repairs to boiler as may be made necessary by ordinary wear and tear, same to be made by the party of the second part.

The party of the second part hereby agrees to operate the said factory as a skimming station or butter factory at their option, during such parts of each year as enough milk shall be delivered to the factory to pay running expenses.

The party of the second part hereby agrees to pay all running expenses of said factory and charge the patrons the same price for making butter as they charge at their other factories, namely three and one half cents per pound for each pound of butter, when said butter shall sell above sixteen cents per pound and three cents per pound when it shall sell under sixteen cents per pound.

(Signed)

NESHKORO DAIRY ASSOCIATION,
T. FITZ, *Pres.*,
FRANK MILLER, *Sec.*
D. J. JENNE & CO.

Witness:

S. W. WALTER.

With the following endorsement on the back:

For value received, we hereby assign and convey to Jenne Creamery Co. all our interest in within contract.

D. J. JENNE & CO.

March 1st, 1902.

149 Exhibit "Y" is as follows:

This agreement made this 15th day of February, 1902 by and between the Redgranite Dairy Association of the Town of Warren, Waushara County, Wisconsin, party of the first part and Jenne Creamery Co. of the city of Berlin, Wisconsin, party of the second part, witnesseth: The party of the first part does hereby demise, lease

and let to the party of the second part the following described building and premises for the term of three years from Jan. 1st, 1902.

The building located on the cross roads on the old Heazlett ranch together with the land adjacent thereto controlled by them.

The party of the second part agrees to pay the party of the first part an annual rental of \$36.00 per year, the same being 10% on the net investment. Payable Jan. 1st each year, commencing Jan. 1st 1903. The party of the first part hereby agrees to furnish sufficient water to operate a skimming station during the term of this lease.

The party of the second part agrees to operate the said skimming station during such parts of each year as enough milk shall be brought to pay running expenses. The party of the second part further agrees to make up the butter for the patrons of this station for the sum of three and one half cents per pound, when butter shall sell for seventeen cents per pound and over and for three cents per pound when it shall sell for under seventeen cents.

REDGRANITE DAIRY ASSOCIATION.
JOS. PIECHOUSKI, *President*.

It is further agreed that if the amount of milk delivered during — year shall at one cent per 100 lbs. *pounds* amount to more than above rental to be paid on that basis.

E. H. JENNE, *Sec'y*.
Secretary.

J. W. BROWN further testified: Exhibits "W" 2 "Z" V T Y and Q appear to be some of the leases and agreements we had with the different companies I can't say that they are the identical ones, I think they are the ones I had in my hands. They came into our hands, the most of them, when Jenne turned his business over to us, I think there were one or two of them renewed, I don't know where there are any other leases and agreements. I supposed they had all been turned over. I have no papers except a few papers from the butter-maker, I don't know whether Mr. Stedman took them or not. These other leases or renewals were similar the same as these here. I don't know where the agreement with the Terrill Company is nor whether there was one executed or not. The arrangement with them was similar to these, I should say. When I took charge we found these arrangements, some of them had been made with the Jenne Company and some with The Jenne Creamery Co. and afterwards I renewed some of them and some of them staid just as they were, but if any of these were renewed, they were along the same lines and the Terril Compan-'s were similar. The paper I received from Geo. Middendorf & Co. amounting to \$105.67 was paid into the Berlin National Bank Oct. 10th and the \$163.29 received of them for the shipment of Oct. 11th was paid into the bank on the 17th of October and the \$123.00 from Ewart & Co. on the shipment of the 11th was paid into the Bank Oct. 24th and the \$129.00 received from them for the shipment was put into the bank Oct. 29th and the \$77.50 received from them for the shipment of the 20th was put in Nov. 2nd and the \$139.45 from the shipment of the 25th was

put in Nov. 5th and the \$102.00 for the shipment of Nov. 8th was put in Nov. 17th. I don't know when the \$81.60 for the shipment of Nov. the 15th was paid into the Bank, it was after the Bank closed and does not appear on the bank-book, the draft or check came to The Jenne Creamery Company. The check of \$339.33 from the Thomas C. Jenkins Company on the Oct. 4th shipment went into the Bank Oct. 15th and the \$336.57 for the shipment of the 11th went in on Oct. 24th and the \$337.50 for the shipment of the 18th went in Oct. 31st and the shipment of Oct. 25th of \$362.62 on Nov. 5th and the \$429.98 for the shipment of Nov. 1st on Nov. 14th and the \$470.62 for the shipment of Nov. 8th came in after the Bank was closed and I turned it over to the Receiver on the 22nd, and the \$257.69 for the November 15th shipment was turned over by me to the Receiver on Nov. 28th.

150 The bank book, Exhibit 3 probably commences with the organization of The Jenne Creamery Co., the first few deposits were made while D. J. Jenne was President. I can only tell from these pencil marks which were made by the Jennes' when I took charge. I think it was subsequent to that it was in my charge; there are a number of check books, I don't know where the last or current one is now, I think Mr. Stedman has it. In looking over the deposit credits from July 1st, I couldn't tell if there is anything there except proceeds of butter, I think so from the book there.

On Sept. 28th the balance was \$1319.36 and on the 28th they deposited \$316.73 and on the 30th \$326.37, and on Oct. 1st \$236.85 and on Oct. 3rd \$230.22 and on Oct. 10th \$105.67 the same day \$142.26 and on the same day \$334.21 and on the 13th \$338.00 and on the 15th \$339.33 and on the 17th \$163.29 and on the 17th \$154.80 and on Oct. 24th on the opposite side there is a charge for checks \$3,526.17 and a balance of \$146.30 carried over to the next page and on Oct. 24th there was a deposit of \$336.57 and on the same day \$123.00 and on the 29th \$129.00 and on the 31st \$339.50 and on Nov. 2nd \$77.50 and on Nov. 5th, \$362.62 and again on the 5th \$139.45 and on the 14th \$429.98 and on the 17th \$102.00 and on the opposite page there was charged for checks \$3,009.90 and an overdraft carried down of \$825.98. The settlement for August was made and the checks nearly all in on Sept. 21 so that in the item of \$3,723.54 it would probably contain for the most part the checks given on Sept. 21st and the settlement was made and the checks for September sent out on Oct. 21st so that the checks so charged up on Oct. 24th would contain all these checks that we had got in by that time between those two times the balance.

Q. Have you that Mr. Brown?

A. Mr. Earling, the Receiver, objected to my looking over the correspondence of the bank containing acknowledgements and he also objected to my taking any memoranda or taking away any memoranda from the books or records. He said I could refresh my memory. He has possession of all the property, books, papers and all that belonged to the bank. I didn't look at any of the acknowledgements because he wouldn't let me. I asked his consent and he said he didn't see any use of that so I didn't look over any of the

correspondence. I can tell only in a general way when The Berlin National Bank was given credit for these checks and drafts received in payment of October and November shipments. Immediately on receipt of them we credited them to the bank's account. We never had any trouble with them in that way. Our New York correspondent was the Hanover National Bank at the time the Examiner took possession Nov. 17 according to the books of the Berlin National Bank, the Bank had funds there of \$1487.00 and the bank had funds on the 17th with The First National Bank of Milwaukee, its Milwaukee correspondent, of \$967.00 and on the same date when the bank closed, the bank had funds with the First National Bank of Chicago, its Chicago correspondent, of \$2240.00, and there were balances due on collections from miscellaneous banks of \$2800.00. The amount of cash we had in the Berlin bank from September 28th on varied from \$7000 to about \$20,000 some days. I include in the cash just cash, currency, silver, etc. When the Examiner took possession Nov. 17th, the cash was about \$1970, there were checks amounting to over \$300, that was the lowest our cash had got, of course that morning we had a good deal more cash than when we closed. I don't know how much we had that morning, we got in \$600 that morning, I don't know what the figures of the cash were when we opened up in the morning but we got in \$6000 during the morning and I think paid out more than that, that day, I don't know about the paying. These items that the bank received on the 15th and 17th were very likely sent off to the correspondent banks the day they were received. We usually tried to get it off on the 3:20 train. It would be practically impossible for these items of Nov. 17th to get to the correspondent banks before we closed; they couldn't get there until the bank closed. The item of the 14th was one of the Jenkins items, Thomas C. Jenkins, I don't know what bank I sent that to, sometimes they were sent to Milwaukee and sometimes to Chicago. I didn't do that work so I don't know. That would be a Pittsburg check and in the ordinary course of business the correspondent bank would send it on to Pittsburg and then they would in the course of mail credit it up to us if it was paid, that would take for us to send it to Milwaukee and for them to get returns, five or six days. When the bank closed it held some of the Jenne Creamery Company's notes. I don't know how many, it must have been \$7000 or \$8000, they were all renewals, most of them
151 run three or four months, I guess there was only one or two of them. Nothing was paid on these notes. I couldn't tell by looking at the bank book when the last of these notes was given. I would give them credit on the bank book, but I could not tell. I think that most of the notes that are in existence are now in our hands, sometimes we consolidated them. At the time we closed, besides what it owed the bank and its patrons The Jenne Creamery Co. owed the Wisconsin Dairy Supply Co. of Whitewater, seventy odd dollars; (I don't remember the exact amount) J. E. Murphy for butter tubs, I don't remember the amount, Hollis Stedman & Sons for supplies over \$100 and it owed the station men something for wages. They have since made a voluntary assignment, the

schedule of their indebtedness has been made up. It wasn't made by them. I think Mr. S. B. Stedman made the schedule, he got some of the figures from me, I don't know how much they owed all of them, I don't know anything about the amount due the patrons, I couldn't tell. The assets they have are machinery and the different factories, these with the farm that was mentioned that belonged to D. J. Jenne, personally, are all their assets, in my judgment their assets are worth about \$7000, that is in the fair market value of the assets under the present condition they are worth less. The business has been unprofitable. They undoubtedly have been insolvent for a long while.

Q. And probably were insolvent when you took charge, weren't they?

A. Mr. Jenne made the statement to me at the time that he couldn't tell how many patrons' checks were outstanding, he thought in the neighborhood of \$5000 at the time he turned the property over, but he thought the assets of the Company were sufficient to meet the obligations and he thought that with economical management the business would pay \$2000 a year but the way they were operating it, it couldn't be made to pay that way because they had to take their living expenses out. His checks overrun his estimate. I don't remember how much the creamery Company owed the bank besides when we took it I don't remember if there were some notes, I can't tell without looking up the records, there was an over draft, I don't know if there were some notes, there were some notes of the D. J. Jenne & Co., they owed \$5000 and he individually owed the bank \$2200. The farm brought \$9000 subject to an incumbrance of \$5000 and interest.

Q. That is it netted something less than \$4000, what was done with that money?

A. D. J. Jenne owed a number of obligations to parties around here and a good share of the money was used for that purpose. I applied \$1400 on the notes of D. J. Jenne & Co.

Q. What became of the balance of their notes?

A. They were paid; you meant to the bank, they are in the receiver's hands. The Creamery Co. owes now \$7000 or \$8000 in addition to these notes of the D. J. Jenne Co. The bank was quite heavily interested then, both in the old company and in the new; once in a while the affairs of the Creamery Co. were up before our Board of Directors and in a general way I reported to them the condition of affairs. There wasn't any material change except a gradual loss, I reported this to them as often as they called for information. It was not talked over at the Directors' Meeting any more than any other matter, all the questionable accounts were talked over quite often but usually there are some particular matters that occupied the whole attention of the meeting, at some meetings this would be the sole topic or main topic. The question of continuing the operation of the creamery or ceasing to operate it was not up before the Board. It was talked over by some of the directors individually. We talked of trying to dispose of the property a number of times, made efforts to do that. The Jenne Creamery Co. did not keep a separate bank account, did not keep its own books, they had no accounts except

all current bills and they had a shipping book, they only dealt in butter the only book that contained their cash dealings were the bank books. We had employees to keep the receipts of the milk and shipments of butter at our different factories but the clerical work done in the City of Berlin was done in the bank.

Q. And who did that?

A. Well, for the last year Miss Stedman had had these books over to her house. She would come down and give me the statement and I would figure the price of butter fat per pound for each patron and estimate the amount that would be due each patron
152 according to that result. I never had any financial interest in this matter at all, I never charged anything for my services, there was some talk about my charging for my services but it was never done.

Q. And your interest in the matter in connection with it arose from the fact that you were a stock-holder and officer of the bank which was involved?

A. We wanted to get as much salvage as possible out of the property.

Q. This agreement which was made with the Jennes was talked over at different times with the directors, was it not?

A. Prior to that we had a special conference or two in which they presented the matter and the directors thought it best to take the property and dispose of it for them and see what salvage we could get out. It was thought better to do that than to have them go into bankruptcy.

Q. That is, it was thought best for the bank?

A. For all concerned.

Q. It was not your personal interest you had at stake, it was the bank's?

A. Yes.

Q. Now, you said there was a gradual loss during the time the business was conducted in that way?

A. That's the way it appears at this end of the period, we didn't know that until after we had run it for a year or two.

Q. In addition to the talks had at the directors' Meetings, did you and Mr. Stedman and Mr. Foster talk matters over?

A. Yes, once in a while, they were familiar to some extent with the situation of affairs not to such a large extent as I was. It was left to me because there was a large amount of clerical work to be done and I understood it.

Q. On Exhibit 3, under date of June 16th 1903, there appears a credit of \$4000, do you know what that is, Mr. Brown?

A. No, I presume that the account was over-drawn at that time and that a note was given to make it good.

Q. Would the giving of such a note be called to the attention of the directors?

A. I don't remember now, we often talked about over drafts when the matter was brought up. Probably the meaning of it is that the Company was probably over-drawn and the bank took their note and supplied the money to pay the checks. The account was over-drawn

and the note was credited to the account. On Aug. 29th the same year there is \$1,000 probably a note for the same purpose and Nov. 13th that would be very likely to be because that is in the fall of the year and the milk supply falls off. The credit of Feb. 18th 1904 is very likely the same, a note given for the same purpose and Dec. the 4th 1903 there is a note for \$1,000 probably for the same purpose. I don't know if there had been new notes given the last year. If there were any new notes given, they were probably given on this account, but not if they were renewal notes. All credits that appear on the bank's books appear there. As I understand it, there were no new notes given since Feb. 18th 1904 only renewals of these old notes. Oct. 21st was the day the checks were dated to pay patrons for September shipment. They might not have been issued for several days. Miss Stedman dated them with a rubber stamp when she had completed the books so as to know what was due each one. There were very few checks drawn after that. They were all dated with date and signed the same. After I drew checks and dated them Oct. 21st to pay for September shipments, there was practically no occasion to draw any more checks only for expenses and no checks were drawn for any later shipment for patrons. The only checks that would be drawn after those dated Oct. 21st would be for incidental expenses. They have a different number and are signed by me especially in ink, except those drawn by Mr. Metcalf.

Q. Has the Creamery Co. ever taken up or paid any of the notes given The Berlin National Bank?

A. Now, I wish to explain before answering that, I wish to state that as the milk increases in the Springs the amounts collected on the sales of butter increases quite rapidly and some times the balance accumulated to the credit of the Creamery Co. and when that amount was, for instance along in June or July, sufficiently large to warrant it, I have taken up one or two small notes. I never had much money to do it, much money in that way, but as the milk decreased in the fall, the note would have to be drawn to meet the over draft. There was always a large amount of checks out-standing in the spring of the year. It was much more than at any other time. I think no notes were paid this last year. The figures or statements from which

Miss Stedman made up these little exhibits that are marked 153 like Ex. "P," some of them she obtained from the milk sheets that would come to her brought in from different stations. She added the milk up computed the butter fat furnished by each patron according to the percentage that she got of the butter maker. The amount of the butter fats she reported to me after deducting the amount that was due the Company for making butter I apportioning the rest according to her reports. I did not furnish her with this package Ex. "E," but the figures there, I added them together and gave her the results. The assignment was made I saw in the paper the 9th of January 1904, I made it but I don't remember the date. Up to that time I continued to act as an officer and director of that Company. I don't know when these statements marked exhibits were made, it was along during the time that I made the computations for October. Other computations were made later than that but before January. I know about quite a number

of checks being outstanding at certain seasons of the year from the appearances of the account. The books show the amounts there was a memoranda also of the amount of checks issued, that is, of the patrons' checks and that was probably figured on it was thought there would be a certain amount out. That is always known to be a fact. That is pretty well demonstrated in this proceeding so far because it has been nearly a month since the last were issued before the bank closed.

Q. When you took up a note would the matter of taking it up be discussed somewhat with the other directors or officers?

A. It would be mentioned or something like that.

Q. They understood that there were checks outstanding which would come in, did they not?

A. Yes, this saved interest perhaps. Whether the receiver makes any claims to the checks and drafts received for butter since the bank closed, I don't know what he thinks about it. The bank has done nothing since it was decided to close the bank, they have had no meetings or consider themselves in existence.

I got at the total number of pounds of butter made from the shipping books and added to that the amount sold to the patrons by the butter maker and to get at the amount of butter fat the milk sheets showed daily the amount of milk brought in by each patron. During the month that milk is tested to ascertain the amount of butter fat and the record is made showing the per cent of butter fat in each patron's milk. The total amount of milk is ascertained from these sheets furnished by any patron and the percentage of butter fat in that milk is ascertained and the amount of butter fat computed as a basis for division of the proceeds and for ascertaining the amount of butter sold and what it brought. We also ascertained what the creamery Company would be entitled to for making it at $3\frac{1}{2}\text{¢}$ a pound, we deducted that from the proceeds of the butter sold and the remainder is proportioned pro rata according to the amount of butter fat of each patron, that is, if we get \$200 net for butter over and above our $3\frac{1}{2}\text{¢}$ for making it and there was 1000 pounds of butter fat they would be entitled to 20¢ a pound for it. There is no deduction to be made by the Creamery Co. except for making it, $3\frac{1}{2}\text{¢}$. In the case of the Spring Lake Butter & Cheese Co., they contributed 2% to a common fund for the purpose of liquidating their indebtedness, that was to be paid over to them once a year, that is in the assets of the Jenne Creamery Co., this year's fund is undivided. The book that shows what it was is in the hands of Mr. Stedman, that was only in the case of the Spring Lake Co. To get at the total receipts for butter, say for October we would take the book here Ex. "E" take the number of pounds and the amounts that we got for it and also the amounts reported sold to patrons from the butter maker and from that I would get the total number of pounds and the total amount we received that month, then I would deduct $3\frac{1}{2}\text{¢}$ for making it then divide the remaining sum by the number of pounds of butter fat to ascertain the cost of butter fat per pound that the patron would be entitled to. The total amount of butter fat and total amount of butter on the milk slips is the total of all these cream-

eries of the entire system and the total amount of butter made as given there if it is correct should agree with the total amount shown on the back Ex. "E" plus what was sold to patrons. If it does not agree there is some mistake. I don't know where the books are that show the amount of milk delivered to each station by each individual and the test of it. I haven't seen them for some months and delivered them to Miss Stedman, they have a book at the factory containing pretty near the same information that the milk sheets do. The sheets are all Manilla paper so that they will stand the weather. The original entry is made on the milk sheets as I understand it.

The balance in the correspondent books when we closed was rather smaller than usual, of course the bank's condition just at that time was worse than it had been for a long time and the probabilities are that there was a larger balance there in each of them. We received interest on several of our accounts which is not the case when the balance is less than \$2000, and within the last five or six months, it might have been a day or so lower than it was when we closed but I have no remembrance now of its being as low as that.

Mr. P. R. EARLING called as a witness:

By the COURT COMMISSIONER: You solemnly swear that the testimony you shall give in this action wherein John Emigh and O. L. Atkins are plaintiffs and P. R. Earling as Receiver of the Berlin National Bank—

Mr. EARLING: As Receiver I don't swear, I don't give any evidence.

Q. Do you decline to be sworn in that action?

A. Well yes I do.

Q. You refuse to be sworn and depose as a witness in that action?

A. As a witness in that case yes.

Mr. NISKERN: Well I think on behalf of the witness or party whichever it is, we would like to have it entered on the record that he refuses to testify and ask that the matter be certified to the Circuit Court to determine the question as to whether he can be compelled to testify.

Q. As I understand you, you decline to be sworn as a witness at all in this action?

A. Personally I wouldn't, but as Receiver I don't think I have any right to.

Q. Then you refuse, absolutely refuse to be sworn at all?

A. As Receiver yes sir.

Mr. THOMPSON: Under our statute we are allowed before putting in formal pleadings to examine any party defendant to ascertain facts to enable us to plead. Of course you are a party defendant as Receiver and we want to examine you as the defendant so as to enable us to plead.

Q. I understand you refuse to be sworn?

A. Well now I suppose I wouldn't be compelled to answer any and all questions even if sworn to be a witness, is that right?

Q. Not unless it is finally determined by the Circuit Court.

By the COMMISSIONER: You solemnly swear that the testimony you shall give in this action wherein John Emight and O. L. Atkins are plaintiffs and P. R. Earling as Receiver of the Berlin National Bank, the Berlin National Bank, Jenne Creamery Company and John W. Brown are defendants, shall be the truth, the whole truth and nothing but the truth so help you God.

Mr. EARLING: I do.

Direct examination by Mr. THOMPSON:

Q. Mr. Earling you are the receiver of the Berlin National Bank?

A. I am.

Q. Appointed by the comptroller of the Currency?

A. Yes.

Q. On what day were you appointed Mr. Earling?

A. 18th day of November.

Q. And on what day did you take possession of the assets of the bank?

A. The 21st I think.

Q. Immediately prior to that time who had been in possession?

A. Mr. Falker.

Q. The National Bank Examiner had possession temporarily?

A. Yes.

Q. Did you after taking possession as Receiver receive from Mr. Brown or the Jenne Creamery Company any drafts or checks payable to that corporation?

A. I can't tell you that.

Q. Do you mean that you cannot remember or that you do not want to answer?

A. Don't want to answer.

The Commissioner directs the witness to answer the question which he refuses to do.

Q. That is you refuse to answer that question?

Mr. NISKERN: We object to the question and ask that it be certified to the Circuit Court.

Q. Have you in your custody as Receiver the receipts or acknowledgements or statements rendered by the correspondent banks as to the drafts or checks sent to them, between October 1st, and
155 November 17th crediting the Berlin National Bank?

A. I can't answer because I have not seen the papers myself, I presume they are among the papers belonging to the bank. The books would naturally be there, I don't know of my own knowledge they are there.

Q. Will you please produce these papers so far as they relate to the forwarding to the correspondent banks and the receipt by them of any of the paper deposited in the Berlin National Bank by the Jenne Creamery Company?

A. I couldn't do that without authority from the department.

Q. That is when you say you couldn't, you refuse to do so without authority from the department?

A. I couldn't do so without authority.

The commissioner directs the witness to answer the question and produce the records in accordance with the demand of counsel.

Mr. NISKERN: Well we ask that it be certified to the Circuit Court.

Q. Have you the custody of the books of the Berlin National Bank showing the amount of cash on hand each day from October 1st, 1904 to the time it closed in that year?

A. Well I presume that the books of the bank are there, I presume I have the records.

Q. I ask you then Mr. Earling if you will please produce them before us at this time in accordance with the subpoena served upon you?

A. Well I can't produce them until I have authority from the department of Washington to do that.

Q. That is you refuse to do so until then?

A. Yes.

By the COMMISSIONER: Mr. Earling you are directed to produce these books according to the demand of counsel.

Mr. NISKERN: Well we object and ask that it be certified to the Circuit Court.

Q. Have you the possession of the books of the Berlin National Bank showing the amount standing to ~~is~~ credit in these different correspondent banks from the first day of October 1904 until the day the bank closed?

A. I think so, I think we have all the records.

Q. I ask you Mr. Earling to produce these books in accordance with the subpoena for their production heretofore served upon you so that we may use them in examining you and examine them at this time.

A. Well I have to refuse like some of the others, for the same reason.

By the COMMISSIONER: The witness is directed by the Commissioner to produce the books according to the demand of counsel.

Mr. NISKERN: Same objection.

W. Have you the bank books containing the account kept by it with the Jenne Creamery Company?

A. Certainly.

Q. I ask you to produce, that is the bank records, I ask you to produce them in accordance with your subpoena for our examination at this time and for our use in examining you?

A. I can't produce them for the same reasons as stated before.

Q. That is you mean to refuse to produce them at this time?

A. Yes.

By the COMMISSIONER: The witness is directed by the Commissioner to produce the books according to the demand of counsel.

Mr. NISKERN: Same objection.

Q. Have you in your control as Receiver Mr. Earling the minute book the record book of the proceedings of the Berlin National Bank?

A. Yes.

Q. I ask you to produce that in so far as it relates to the Jenne Creamery Company or shows any entries in regard to the Jenne Creamery Company or its transactions with the bank.

A. I have to refuse to do it.

By the COMMISSIONER: The witness is directed to make the production of the record according to the demand of counsel.

Mr. NISKERN: Same objection, same request.

Q. Have you in your custody as Receiver, Mr. Earling the notes and other evidence of indebtedness from the Jenne Creamery Company to the Berlin National Bank?

156 A. Yes I have.

Q. I ask you to produce them at this time in accordance with the subpoena for our examination and for our use in examining you?

A. Well I have no particular objection, but as there are so many others I refuse.

By the COMMISSIONER: You are directed to produce them according to the demand of counsel.

Mr. NISKERN: Same objection, same request.

By the COMMISSIONER: The further hearing in the matter of the deposition of the witness, P. R. Earling is now adjourned by consent of all parties until the 28th day of February 1905 at ten o'clock A. M. at the office of the Commissioner, Number 209 Huron Street, City of Berlin, Green Lake County, state of Wisconsin, one of the United States of America.

157 At a further hearing before the Court Commissioner had March 10th 1905, JOHN W. BROWN recalled as a witness, testified: The \$105.67 received from Middendorf & Co. on Oct. 10th 1904 would be a Chicago check; that was credited to the account of The Berlin National Bank on the books of The First National Bank of Chicago on Oct. the 11th as shown by their acknowledgment produced here. That credit was given us on the terms stated in their postal of acknowledgment.

Q. That acknowledgment shows a total credit of \$1513.31, that would include the amount of this check?

A. That check was one of the items included in that amount. Middendorf's check was drawn on The First National Bank of Chicago. Ex. 4 is the acknowledgment from the bank that I refer to reading as follows: "The First National Bank of Chicago, Chicago, Oct. 11, 1904. Your favor of the 10th received with stated enclosure, we credit your account \$1513.31 entered for collection—item. Remittances credited upon receipt subject to collection. Englewood, West Pullman, Woodlawn, Hyde Park, Ravenswood, South Chicago, Garfield Park, Roseland's Bank, checks collected by mail other check items are paid unless advised unpaid the day received. R. J. Street Cashier."

I received no advice that this item was unpaid. The item on the bank book and shipping book of Oct. 17 being \$163.29 received from Middendorf would be a check on the same Chicago bank and that was sent by the Berlin bank to The First National Bank and was credited on the books of the Chicago bank Oct. the 18th 1904, shown by Ex. 5 which exhibit is the same in form as Ex. 4, except as to amount and date and I never was advised that that was not paid. The item of \$336.57 showing on the shipping book and bank book received Oct. 24th was sent by the Berlin bank to The First National Bank of Chicago and the acknowledgment, Exhibit 6 shows that The Berlin National Bank got credit for it Oct. 25th 1904 in the same form as shown by Ex. 4. That was a check on the bank at Pittsburg, Pennsylvania. I don't know where the Chicago bank would send that, the presumption that it would have to go to the bank at Pittsburg as a Chicago bank would naturally have a correspondent at Pittsburg. In the ordinary course of business it would take about four or five days to get returns, I never got advice that it was unpaid. The item of \$337.50 shown by the shipping book and bank book that the creamery Company got on the 31st of October from Thomas C. Jenkins was sent by the Berlin bank to The First National Bank of Milwaukee for collection and their acknowledgment Ex. 7 shows they gave the Berlin bank credit for it Nov. 1st 1904; said Exhibit 7 reading as follows: "The First National Bank of Milwaukee (Names of officers and Capital in print) Milwaukee, Nov. 1st, 1904, Mr. J. W. Brown, Cashier,—Your favor of the 31st received with stated enclosures, entered for collection. Your account has credit \$1441.64, 60¢ taken out \$1441.04." That is the item it would be contained in. The card also had on it out of town items credit subject to final payment. In the ordinary course of business it would be four or five days before the Milwaukee bank would get returns from that check. They never advise me that it hadn't been collected. The item shown by the bank book and shipping book amounting to \$362.62 received Nov. 5th was credited to the Berlin bank by its correspondent in Chicago Nov. 7th 1904 and in the ordinary course of business it would take four or five days to get returns on it and that acknowledgment is Exhibit 8 and of the same form as Exhibit 4. The item of \$429.98 shown by the shipping book and bank book of the Creamery Company received Nov. 14th 1904 was credited to the Berlin bank by The First National Bank of Chicago Nov. 16th 1904, shown by Exhibit 9 which except for date and amount is the same as Exhibit 4 and in the ordinary course of events it would take the First National Bank of Chicago four or five days to make collection on it. The item of \$123.00 shown by the shipping book and deposit book of the creamery Company, received Oct. 24th, was sent by the Berlin bank to The Hanover National Bank and they gave the Berlin bank credit for it Oct. 26th 1904. They usually sent us a check drawn by the Fort Pitt National Bank of Pittsburg on the Chemical National Bank of New York, payable to their own order endorsed to The Jenne Creamery Company and that would in the ordinary course of events be collected within a day, their acknowledgment is Ex. 10. The item of \$129.00 which the shipping book

and the deposit book show, The Jenne Creamery Company received on Oct. 29th would be the same kind of a check and
 158 The Berlin National Bank received credit from The Hanover National Bank for that amount Oct. 31st, 1904 and in the ordinary course of events the Hanover bank would collect that within twenty-four hours. That acknowledgment is Exhibit 11. The item 77.50 shown by the shipping book and bank book the creamery Company got about Nov. 2nd was credited to the Berlin bank by The Hanover National Bank Nov. 4th 1904, the checks were all the same. And would be collected by the Hanover bank within a day, that acknowledgment is Exhibit 12. The item of \$139.45 shown by the shipping book and bank book, the creamery Company received about Nov. 5th, was credited to the Berlin Bank by the Hanover National Bank Nov. 7th 1904 and would be collected by that bank within two days because the 8th was Election Day and the bank was not open. Would be probably collected the 7th or 9th, that acknowledgment is Exhibit 13. These exhibits 10, 11, 12 and 13 all read as follows: "The Hanover National Bank, New York (here date stamped) 190—, Yours of (date written in) inst. received with enclosures as stated. Footing of letter (amount inserted) for collection. We have received check \$— for your credit from ——. Yours respectfully, Elmer E. Whittaker, Cashier." That is the form of all the acknowledgments of the Hanover National Bank.

The Berlin National Bank had to its credit in The First National Bank of Chicago on the 10th day of October 1904 at the close of business \$1827.70, on the 11th \$2208.63, on the 12th \$1174.31, on the 13th \$1506.89, on the 14th \$1411.17, on the 15th \$2786.60, on the 17th \$1355.89, on the 18th \$1425.98, on the 19th \$2242.74, on the 20th \$3069.10, on the 21st \$2815.79, on the 22nd \$2794.54, on the 24th \$3642.71, on the 25th \$7290.82, on the 26th \$7173.63, on the 27th \$4679.46, on the 28th \$4502.60, on the 29th \$4219.83, on the 31st \$2799.74, on Nov. 1st \$2591.55, Nov. 2nd, \$2228.47, Nov. 3d \$1862.95 Nov. 4, \$1801.08, Nov. 5 \$1543.82, Nov. 7 \$1761.16, Nov. 10th \$1578.43 Nov. 11th \$1241.43, Nov. 12th \$1691.19, Nov. 14th \$2067.60, Nov. 15th \$4887.95, Nov. 16th \$4835.64, Nov. 17th \$2240.29. These are the net amount- to the credit of the Berlin bank at the close of business at each day as shown by their books but the actual amount in the correspondent bank might be considerably larger on each day because of drafts not yet presented. I cannot tell what amount the Receiver got. That would appear from his books but our books show that when business was closed by the Bank on the 17th of November The First National Bank of Chicago held \$2240.29 of the moneys of The Berlin National Bank in its hands.

On Oct. 31st The First National Bank of Milwaukee had of the funds of The Berlin National Bank in its hands \$7380.07, Nov. 1st \$7219.85 Nov. 2nd \$7471.82, Nov. 3d \$5464.99, Nov. 4 \$5969.79 Nov. 5th \$6562.69, Nov. 7th \$843.99, Nov. 9th \$7093.10, Nov. 10th \$3955.68, Nov. 11th \$3122.07, Nov. 12th \$1177.11, Nov. 14th \$7974.31, Nov. 15th \$5205.14 Nov. 16 \$1844.03, Nov. 17th \$967.59.

That last amount is the amount according to our books they had at the time our bank closed business.

Oct. 29th The Hanover National Bank of New York had of the funds of the Berlin National Bank in its hands \$2383.40, Oct. 31st \$2689.89, Nov. 1st \$1971.72, Nov. 2nd \$959.89, Nov. 3d \$210.48, Nov. 4th \$213.13, Nov. 5th \$758.20, Nov. 7th \$3222.13, Nov. 9th \$1663.03, Nov. 10th \$1419.58, Nov. 11th \$889.73, Nov. 12th \$1531.43, Nov. 14th \$926.33, Nov. 15th \$1614.10, Nov. 16th \$1799.60, Nov. 17th \$1487.12.

These statements in regard to the account of The Hanover National Bank I have made by referring to the original account of the Berlin National Bank.

Q. That account shows an overdraft on the 4th of Nov., on the next day you sent forward funds to what amount on that bank?

A. \$1080.98 and on the 5th we drew \$22.15 so that is those funds reached the New York bank before the draft drawn on the 4th were presented and paid, there would have been plenty of funds to meet them and leave \$800 or so to the credit of The Berlin National Bank. In the ordinary course of events the letter containing those funds would go right straight through from our bank to the New York bank. In this case it was mailed on the 5th, it would be there on the 7th, the 5th was Saturday, consequently it would be the next business day. In the ordinary course of business drafts we drew on the 4th would be delivered to our customers and sent to the different parts of the city and ordinarily the parties receiving them would deposit them in their banks and those banks would send
159 them to the Hanover National Bank or to the clearing house to be paid so that in the ordinary course of business on the 4th of 5th of Nov. there would have probably been funds of The Berlin National Bank in the hands of The Hanover National Bank to the amount of a number of hundred dollars. Any of those drafts issued on the 4th of November it would have been impossible to present it before the 7th of November on account of the Sunday intervening so that the New York Bank naturally would have funds there at that time.

From the bank books the amount of cash in the vaults of the Berlin bank each day commencing with Oct. the 1st 1904, was as follows:

Oct. 1st, \$1213.46, net cash; cash items \$1170.78.
Oct. 3rd, \$9523.60, net cash; cash items \$668.43.
Oct. 4th, \$10230.18, net cash; cash items \$932.35.
Oct. 5th, \$10605.10, net cash; cash items \$1794.81.
Oct. 6th, \$11474.68, net cash; cash items \$768.76.
Oct. 7th, \$10920.41, net cash; cash items \$879.82.
Oct. 8th, \$9831.04, net cash; cash items \$4090.14.
Oct. 10th, \$7913.54, net cash; cash items \$2205.38.
Oct. 11th, \$11532.32, net cash; cash items \$779.68.
Oct. 12th, \$10771.07, net cash; cash items \$1158.18.
Oct. 13th, \$8717.06, net cash; cash items \$1063.51.
Oct. 14th, \$7742.04, net cash; cash items \$1667.11.
Oct. 15th, \$6225.33, net cash; cash items \$4169.76.
Oct. 17th, \$7095.44, net cash; cash items \$2275.32.

Oct. 18th, \$10656.80, net cash; cash items \$1703.25.
 Oct. 19th, \$11352.87, net cash; cash items \$1663.61.
 Oct. 20th, \$11635.16, net cash; cash items \$907.62.
 Oct. 21st, \$12595.25, net cash; cash items \$1234.34.
 Oct. 22nd, \$11298.40, net cash; cash items \$590.44.
 Oct. 24th, \$8668.03, net cash; cash items \$549.75.
 Oct. 25th, \$8524.88, net cash; cash items \$419.25.
 Oct. 26th, \$12334.74, net cash; cash items \$624.76.
 Oct. 27th, \$11725.97, net cash; cash items \$2056.71.
 Oct. 28th, \$13232.62, net cash; cash items \$1201.93.
 Oct. 29th, \$12540.52, net cash; cash items \$2215.15.
 Oct. 31st, \$13811.33, net cash; cash items \$282.22.
 Nov. 1st, \$13,442.26, net cash; cash items \$1987.13.
 Nov. 2nd, \$13,937.53, net cash; cash items, \$645.12.
 Nov. 3rd, \$13,843.94, net cash; cash items \$2547.17.
 Nov. 4th, \$13,802.71, net cash; cash items \$1221.89.
 Nov. 5th, \$11,680.33, net cash; cash items, \$1114.91.
 Nov. 7th, \$10,002.16, net cash; cash items \$792.68.
 Nov. 9th, \$8,380.97, net cash; cash items \$1516.68.
 Nov. 10th, \$8105.25 net cash; cash items \$859.90.
 Nov. 11th, \$4287.65 net cash; cash items \$1493.80.
 Nov. 12th, \$7311.17, net cash; cash items \$1503.16.
 Nov. 14th, \$5332.73, net cash; cash items \$1300.75.
 Nov. 15th, \$4908.00, net cash; cash items \$2766.73.
 Nov. 16th, \$2175.51, net cash; cash items \$1074.79.

I included in the term cash silver and gold paper money, nickels and bronze coin everything that goes as money. Cash items means the checks that come in during the day. When not on the counters the bank kept its cash in two compartments in the safe in the vault divided up in both compartments. It was kept there except as we had it out for use. I do not know anything about how much Stedman and Foster had in the creamery company. I have here a statement from The Hanover National Bank showing the condition of the funds of The Berlin National Bank in its possession up to Nov. 18th and referring to that statement they had on hand Nov. 4th \$3117.74, and the account shows that they received on the 7th those items I sent them on the 5th and from the 7th on they would have as much or more funds on hand than our bank books here show. They had a larger amount than we had.

P. R. EARLING on said examination testified: The Hanover National Bank turned over to me as receiver of The Berlin 160-162 National Bank about \$3100.00. The First National Bank of Chicago did not turn over a cent, they applied the balance that we had there to cover the notes of the bank which they held and there we did not get anything, there was nothing came into my hands from them. The Milwaukee Bank turned over to me about \$1800.00.

Q. What notes was it the Chicago Bank held?

By Mr. BROWN:

A. Notes of The Berlin National Bank to them.

Q. Now Mr. Earling did you receive a check of \$102.00 from the Jenne Creamery Co. about the 17th of November? Did that check come into your hands as receiver from the Examiner?

By Mr. BROWN:

A. That was listed among these checks here, cash items of the last day deposited by Mr. Parker as I understand it to The First National Bank of Berlin?

Q. Mr. Parker was representative of the creamery Company?

By Mr. EARLING:

A. Mr. Parker was the Bank Examiner and first receiver. That check afterwards came into my hands as receiver, also I received on the 28th of November from the creamery Company or from Mr. Brown acting for it the check of \$81.60 sent by S. Ewart & Co. to The Jenne Creamery Company and as receiver on Nov. 28th I received the check of \$257.69 sent by Thomas C. Jenkins to the creamery Company and on the 22d of Nov. received the check for \$470.62 sent by Thomas C. Jenkins to the creamery Company. There was \$2281.46 cash turned over to the examiner and by him turned over to me as receiver of The Berlin National Bank. Of that, \$311.31 is what I called cash items.

I am willing now to answer requests and questions in regard to the production of books and documents which I heretofore declined to answer and declined to produce the records. I have done so substantially to questions put to me today and if counsel desire to ask any further questions which I then refused, I am now ready to answer.

* * * * *

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EXHIBIT 3.

PL'FS' EX. C.—JOHN, J. W., JR.

This Agreement made this 4th day of February A. D. 1902 by and between The Spring Lake Butter & Cheese Co. of the Town of Marion, Waushara County, Wisconsin, party of the first part, and D. J. Jenne & Co. of Berlin, Green Lake County, Wisconsin, party of the second part.

Witnesseth:

The party of the first part does hereby demise, lease and let to the party of the second part the following described buildings and premises: — to be built by them to be located in — Town of Marion, Waushara Co. together with the land adjacent thereto owned or controlled by them.

The party of the second part hereby agrees to pay to the party of the second part an annual rental of an amount equal to 10% of the total amount invested in said buildings by the party of the first part, and the party of the second part does hereby further agree that if the

amount of milk delivered by the patrons to this factory during the year shall amount to an amount more than 10% on the amount invested, figured at one cent on each one hundred pounds of milk so delivered, then the rent for said buildings shall be determined by the amount of milk at one cent per hundred pounds.

This lease to continue for the period of three years from the first day of January 1902. Rent to be payable on the first day of January of each year, commencing January 1st 1903.

The party of the first part hereby agrees to furnish the party of the second part sufficient water to run the factory during term of this lease, also to keep building in repair.

The party of the second part hereby agrees to operate the said factory, placing necessary machinery therein, as a butter factory or skimming station, during such part of each year as enough milk shall be brought to it, to pay running expenses. The party of the second part hereby agrees to make the butter for the patrons of this factory for three and one-half cents per pound whenever butter shall sell for seventeen cents per pound or over and for three cents per pound whenever it shall sell below seventeen cents per pound. The party of the second part agrees to bear all operating expenses of factory including transportation of cream.

The party of the first part shall have the privilege of electing a Secretary, whose business it shall be to secure from the party of the second part a monthly statement with original Bills of Sale of all butter sold during the month, showing complete account of all butter manufactured and sold and prices obtained. The party of the second part hereby agrees to allow said Secretary reasonable compensation for his services.

(Signed)

R. J. MARR, *Secretary.*

O. L. ATKINS,

Pres. of Spring Lake Butter & Cheese Co.

D. J. JENNE & CO.,

By E. H. JENNE.

Witness:

C. E. LEACH.

[Endorsed:] We will agree to divide the station milk between Neshkoro and Spring Lake where the distance is the same to the station.

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Ex. 4.

PL'FS' EX. A.—JOHN, J. W., JR.

Know all men by these presents, That the Jenne Creamery Company of the city of Berlin, in Green Lake County, Wisconsin, is held and firmly bound unto the Marion and Mount Morris Butter and Cheese Company of the town of Marion in Waushara County, Wisconsin, in the sum of One Thousand Dollars lawful money of the United States of America to be paid to the said Marion and Mount Morris Butter & Cheese Co., or its legal representatives: to which

payment well and truly to be made the said Jenne Creamery Company binds itself and its legal representatives, firmly by these presents.

Executed under the corporate seal of said Jenne Creamery Company and dated at the city of Berlin in the state of Wisconsin on the 12th day of May A. D. 1904.

The condition of this obligation is such that whereas the said Jenne Creamery Company is operating a skimming station the property of the obligee in the town of Marion in Waushara County, aforesaid, and from time to time is indebted to the persons bringing milk to said station in divers sums from the proceeds of butter made and sold by said Creamery Company.

Now, therefore, if the above bounden Jenne Creamery Company or its officers or legal representatives, shall well and truly pay to the persons, patrons of said skimming station, the sums due them from time to time on account of butter made from the milk, the proceeds of which shall be collected and received by said Creamery Company, in accordance with the terms of a written contract between the parties hereto of even date herewith: said payments to be made monthly and within thirty days after the last collection shall be made for butter made during the month for which payment shall be due, then this obligation to be void, otherwise to remain in full force and effect.

JENNE CREAMERY COMPANY,
By JNO. W. BROWN, *Treasurer*.

[CORP. SEAL.]

O. H. OLSON,
Wautoma R. F. D. No. 1.

* * * * *

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EXHIBIT 6.

This Indenture Made and entered into this 1st day of October A. D. 1902, by and between D. J. Jenne and E. H. Jenne, both of the City of Berlin in Green Lake County, Wisconsin, parties of the first part, and John W. Brown of the said City of Berlin in said county of Green Lake, party of the second part.

Witnesseth, Whereas the said parties of the first part are now and for several years last past have been partners in business, doing business under the firm name and style of D. J. Jenne & Company, and the said parties of the first part are also the principle stockholders and owners of the majority of the capital stock of the Jenne Creamery Company, a corporation, and the said parties of the first part own said capital stock in connection with one Frank Rivers and Bessie Jenne, who is the wife of the said E. H. Jenne.

And Whereas the said parties of the first part as said partners doing business under the name of D. J. Jenne & Company are indebted to divers persons in divers sums of money and the said Jenne Creamery Company, said corporation, is also indebted to divers persons in divers sums of money.

And Whereas, the said D. J. Jenne and E. H. Jenne as said partners, parties of the first part and as holders and owners of said cap-

ital stock of the said Jenne Creamery Company have become and are at present unable to pay said indebtedness, and the said parties of the first part are desirous of providing for the payment of the said indebtedness of the said D. J. Jenne and E. H. Jenne as said partners, and are desirous for providing for the payment of the said indebtedness of the said Jenne Creamery Company by an assignment of all of the property and effects of the said parties of the first part (except such as may be exempted from seizure on attachment or execution under the laws of the state of Wisconsin for that purpose.

And Whereas the said D. J. Jenne is the owner of a farm situated in Waushara County, Wisconsin, said farm being more particularly described in a deed and conveyance thereof executed by the said D. J. Jenne to the said party of the second part on this date, said deed bearing even date with this agreement, and which said farm has been so conveyed to the said party of the second part for like purpose; namely, to provide for the payment of the said indebtedness of the said D. J. Jenne and E. H. Jenne as partners and the said indebtedness of the said Jenne Creamery Company, said corporation.

168 Now this indenture witnesseth, that the said parties of the first part in consideration of the premises and in consideration of One Dollar (\$1.00) in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged have given, granted, bargained, sold assigned, conveyed, transferred and set over and by these presents do give, grant, bargain, sell, assign, convey, transfer and set over unto the said party of the second part all and singular the lands, tenements, hereditaments and appurtenances, goods, chattels, accounts, promissory notes, bonds, bills, debts, choses in action, claims, demands, property and effects of every kind and description, real, personal and mixed belonging to the said parties of the first part or in which they have any right or interest or which are held by any person or persons for them or in trust for them (except such as are exempt from levy and sale under execution under the laws of the state of Wisconsin) and being the property and effects of the said D. J. Jenne and E. H. Jenne as partners doing business under the firm name and style of D. J. Jenne & Company and the same being more fully and particularly enumerated and described in an inventory thereof hereto attached and marked "Inventory Number One", and made a part hereof.

And the said parties of the first part do hereby on like consideration give, grant, bargain, sell, assign, convey, transfer and set over to the said party of the second part all of their shares of capital stock of the said Jenne Creamery Company, being 136 shares of stock of the par value of Fifty Dollars (\$50.00) per share, and it being also intended hereby, together with the transfer of said shares of capital stock, to assign, sell, set over and convey to the said party of the second part all of the interest of the parties of the first part or either of them in and to the goods, chattels, accounts, notes, bonds, bills, debts, choses in action, leases, claims, demands, tenements, hereditaments and appurtenances belonging to the said corporation, to wit, the said Jenne Creamery Company, the same being more fully and

particularly enumerated and described in an inventory thereof, to-wit, an inventory of the property of the said Jenne Creamery Company hereto attached, marked "Inventory Number Two", and made a part hereof. It is understood that no personal property of parties of the first part is hereby conveyed except what appear as listed on inventories one and two above mentioned.

169 And the said D. J. Jenne, one of the parties of the first part, does hereby execute and deliver to the said party of the second part said deed of said farm hereinbefore mentioned.

And the said party of the second part is to have and hold all of the above described property and each and every part thereof, including the legal title to said farm and including said stock in said Jenne Creamery Company, and each and every part thereof to him and his assigns in trust nevertheless and to and for the uses, interests and purposes following, that is to say

The said party of the second part shall take possession of all of the property hereby transferred or intended so to be, including said farm and real estate and said stock in said corporation and shall, with all convenient diligence, proceed to sell and dispose of the same and to convert the same into money as fast as may be done without loss or sacrifice, and shall also with all reasonable diligence, collect and receive all and singular the debts, dues, bills, bonds, notes, accounts and balances of account, judgments, securities, claims and demands hereby conveyed. It is nevertheless agreed that at the option of the said party of the second part he may, as a stock holder of the said Jenne Creamery Company, continue the operation of said Creamery Company's business, forming a new corporation or changing the name of said corporation as to him shall seem best and in all ways control said stock as an absolute owner thereof, and if necessary and to him it seems best he shall have power and authority to wind up the affairs of said corporation and act as one of the stockholders in winding up the affairs of said corporation, and out of the proceeds of said sales and collections and out of the proceeds of the operation of the said Jenne Creamery Company, the said party of the second part is to make such payment or payments to the creditors of the said parties of the first part and of the said Jenne Creamery Company pro rata so far as said proceeds of sales and collections and of the operation of the said Creamery Company's business will go, towards paying such indebtedness; but it is understood and agreed that the cost and expense incurred by the said party of the second part in the execution of his trust under this agreement shall be first paid before any payments are made on indebtedness of the said parties of the first part or of the said Jenne Creamery Company.

And it is further agreed that if, after the payment of all
170 costs, charges and expenses attending the execution of the trust hereby created and the payment and discharge in full of all lawful debts, due and owing by the said parties of the first part, of every kind and description and the payment and discharge in full of all lawful debts, due and owing by the said Jenne Creamery Company of every kind and description any part or portion of the proceeds of said sales and collections or of the proceeds of the opera-

tion of the business of the said party of the second part or his assigns, he, the said party of the second part shall return the same to the said parties of the first part, their heirs, executors and administrators; and if after payment in full, as aforesaid, there should remain in the hands or possession of the said party of the second part or his assigns, any part or portion of the property or effects hereby assigned which shall not have been sold, collected or converted into money he shall return, re-assign and re-deliver the same to the said parties of the first part, their heirs, executors and administrators by proper, full and complete instruments of re-conveyance or re-assignments.

But nevertheless it is understood and agreed by and between the parties hereto and by and between the said D. J. Jenne and the said party of the second part that the said party of the second part is to have the absolute right to sell and convey said farm so conveyed to him by deed absolutely and free from any claim thereto or to the proceeds arising from such sale by the said D. J. Jenne, anything herein to the contrary notwithstanding, it being intended that the said party of the second part shall have good right and lawful authority to sell and convey said farm by warranty deed or otherwise as to him, the said party of the second part, shall seem best, anything herein to the contrary notwithstanding.

And in furtherance of the premises the said parties of the first part and each of them do hereby make, constitute and appoint the said party of the second part their true and lawful attorney and as the true and lawful attorney of each of them, irrevocably with full power and authority to do all acts and things which may be necessary in said premises and to the full execution of the trust hereby created and to ask, demand, recover and receive of and from all and every person or persons all property, debts, and demands due and owing and belonging to the said parties of the first part or either of them and to acquit-ance and discharge for the same, to sue, 171-191 prosecute, defend and implead for the same and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said parties of the first part do hereby authorize the said party of the second part to sign the names of the said parties of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said parties of the first part or either of them, or to sign the names of the said parties of the first part or either of them to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument and covenants and agrees to and with the said parties of the first part that he will faithfully and without delay execute the trust hereby created according to the best of his knowledge, skill and ability.

It is understood and agreed between the parties hereto, that the said party of the second part is to have the right and authority, if in his opinion it is necessary to avoid litigation and to conserve the assets and property hereby assigned to him, to pay any claim in full

against said parties of the first party or said Jenne Creamery Company and if necessary said party of the second part may advance money for such purpose and reimburse himself for moneys so advanced, out of the proceeds of sales of property hereby assigned to him or out of proceeds of business of said Creamery Company, said corporation.

Further agreed that said party of the second part is not required under this agreement, to pay any debt of the firm of D. J. Jenne and Company to the Jenne Creamery Company, said corporation nor any debt of either of said parties of the first part to said corporation or to each other until funds have been received from sale of property and assets of D. J. Jenne and D. J. Jenne & Co. sufficient to pay such obligations.

In Witness Whereof the said parties have hereunto set their hands and seals the day and year first above written, in duplicate.

D. J. JENNE.	[SEAL.]
E. H. JENNE.	[SEAL.]
JNO. W. BROWN.	[SEAL.]

In Presence of

PERRY NISKERN.
HORACE E. STEDMAN.

* * * * *

192 The Berlin National Bank, Berlin, Wis., in Account with
the Jenne Creamery Co.

192½ EXHIBIT 11 (EX. 3 BEFORE WOOD). E. H. S.

Red lines show pages. J. O. L.†

193 The Berlin National Bank in Acc't with Jenne Creamery Co.

		Dr.		Cr.	
		Deposits.			
1902.					
June	21	Deposit Rrt.....	1,357 24	July 25	Total ch'ks..... 4,661 93
	27	" Et.....	200 06		Balance..... 816 78
	28	" Rrt.....	147		
July	3	" Ellist.....	1,396 10		
	11	" Ellist.....	1,396 62		
	19	" Armourt...	569 94		
	21	" Jenkt.....	411 75		
			<u>5,478 71</u>		<u>5,478 71</u>
1902.					
July	25	Balance.....	816 78		
	28	Deposit Armourt...	344 76		
	30	" ".....	797 79		
Aug.	1	" Jenkins.....	237 52		
	6	" Ellist.....	897 36		
	8	" Armourt...	525 40		
		Ellis 902.65† D. J. J. & Co. 4.89†			
	11	".....	907 44		
		Ellis 274.49† Brown 493.02†			
	18	".....	767 51		
		" 2400.00† 126.07†			
	20	".....	2,526 07		
		Jenk. 289.57† W. & Co. 34.98†			
	22	".....	324 55		
	23	" Jenkins.....	603 54	Aug. 23	B. checks..... 7,761 79
	20	Ins.....	10 18		Balance..... 997 11
		Total.....	<u>8,758 90</u>	Total.....	<u>8,758 90</u>
Aug.	23	Balance.....	997 11		
		Ellis 775.72† W. & Co. 11.77†			
	25	Deposit.....	787 49		
	28	" Ellist.....	374 80		
	30	" Ewart.....	422 91		
Sept.	5	" Jenkins.....	625 76		
194					
	9	" Moore.....	60 73		
	12	" Jenkins.....	686 91		
	15	" Moore.....	427 23		
	19	" Jenkins.....	132 63		
	20	" Ewart.....	86 10	Sept. 22	Checks..... 5,724 32
		Moore 379.22† Weare 193.64†			
	22	".....	572 86		
Aug.	30	In. Brown.....	4 80		Balance..... 55 01
		Totals.....	<u>5,779 33</u>		<u>5,779 33</u>

[† In pencil in copy.]

Sept.	22	Balance.....	55 01
	28	Deposit.....	885 02
Oct.	4	".....	1,079 72
	7	".....	3,000 00
	8	".....	230 89
	9	".....	312 23
	11	".....	295 65
	"	".....	9
	13	".....	353 58
	15	".....	551 86
	18	".....	336 61
	25	".....	3 59
	27	".....	177 99
	"	".....	659 76
	30	".....	572 44
Total.....			<u>8,523 35</u>

Oct.	31	Checks.....	7,677 75
Oct.	31	Balance.....	<u>845 60</u>
Total.....			<u>8,523 35</u>

195

Oct.	31	Balance.....	845 60
	"	Deposit.....	26 09
Nov.	3	".....	129 79
	4	".....	1 18
	7	".....	658 10
	8	".....	100 00
	15	".....	390 88
	19	".....	61
	20	".....	293 12
	21	Balance.....	570 11
Total.....			<u>3,215 48</u>

Nov.	'21	Checks.....	3,215 48
Total.....			<u>3,215 48</u>

Nov.	21	Deposit.....	380 40
	22	".....	284 02
	24	".....	75
	26	".....	32 95
	28	".....	203 05
	"	".....	1,000
Dec.	1	".....	344 53
	3	".....	113 14
	6	".....	383 87
	11	".....	55 79
	11	".....	482 32
	16	".....	4,200
	17	".....	119 70
	"	".....	260 69
	24	".....	38 70
	"	".....	577 10
	30	Balance.....	81 12
Total.....			<u>8,658 13</u>

Nov.	21	Balance.....	570 11
------	----	--------------	--------

Dec.	30	Checks.....	8,088 02
Total.....			<u>8,658 13</u>

196

Jan'y	2	Deposit.....	307 86
	9	".....	102 20
	3	".....	55
	5	".....	123 90
	7	".....	10
	9	".....	409 78
	10	".....	327 45
	15	".....	385 32
	23	".....	470 94
	26	".....	13 50
	29	".....	190 95
	30	".....	18 55
	"	".....	17 67

Dec.	30	Balance.....	81 12
------	----	--------------	-------

31	15 08		
Feb'y 2	243 16		
5	312 86		
10	46		
11	8 00		
11	60		
16	420 72		
19	280 45		
26	247 40		
Balance	393 55	Feb'y 28 Checks	4,324 82
Total	4,405 94	Total	4,405 94

197

Mar. 4	Deposit	251 12	Feb'y 28 Balance	393 55
5	"	237 95		
7	"	103 95		
14	"	249 98		
"	"	226 80		
17	"	20 73		
19	"	126 02		
21	"	358 56		
30	"	371 39		
Apr. 2	"	668 87		
7	"	78		
9	"	461 76		
16	Balance	1,470 48	Apr. 16 Checks	4,128 84
Total		4,522 39	Total	4,522 39

Apr. 17	Deposit	575 90	April 16 Balance	1,470 48
"	"	12 56		
20	"	209 26		
24	"	563 36		
27	"	166 32		
30	"	523 47		
May 7	"	697 09		
9	"	211 47		
14	"	358 74		
15	"	43 74		
18	"	276 72		
20	"	88 56		
"	"	391 49		
21	"	384 55		
Total		4,503 26		

1,687 94

May 22	Checks	2,815 27
	Balance	217 51
Total		4,503 26

198

May 22	Balance	217 51
22	Deposit	6 07
23	"	33 17
"	"	1 20
25	"	561 52
"	"	92 88
29	"	382 29
June 1	"	68 47
"	"	607 97
"	"	867 58
6	"	303 96
7	"	598 82
8	"	623 20
11	"	293 32
13	"	1,147 69
15	"	1,031 48
"	"	700 56
16	"	4,000

JOHN EMIGH AND O. L. ATKINS.

99

18 Deposit.....	299 02
19 "	743 47
Total	<u>12,580 16</u>

June 19 Checks.....	9,471 25
Balance.....	3,108 91
Total	<u>12,580 16</u>

199

June 19 Balance.....	3,108 91
20 Deposit	36 54
22 "	769 92
" "	43
23 "	146 35
26 "	646 15
" "	287 32
27 "	87 07
29 "	683 68
June 1 "	288 98
3 "	605 14
6 "	9 89
" "	638 58
9 "	272 26
11 "	546 09
15 "	108 69
" "	271 47
20 "	725 04
" "	464 12
Total	<u>9,706 62</u>

July 21 Checks.....	8,317 08
Balance.....	1,389 55
Total	<u>9,706 63</u>

200 181,718 18

July 21 Balance.....	1,389 55
22 Deposit	1,792 38
" "	151 25
23 "	271 70
27 "	196 88
29 "	21 57
31 "	273 42
Aug. 4 "	197 37
5 "	1,323 14
7 "	337 17
8 "	153 94
10 "	22 04
" "	258 52
15 "	76
" "	337 61
17 "	696 66
" "	364 28
19 "	1,095 92
21 "	348 67
22 "	30 93
24 "	1
" "	524 13
" "	251 78
" "	158 83
26 "	2 14
27 "	432 34
" "	28
28 "	42

29 Deposit	1,000
" "	3 20
" "	8 67
31 "	462 49
Sept. 1 "	399 28
2 "	118 29
4 "	474 28
5 "	205 19
8 "	405 86
10 "	473 60
15 "	140 37
16 Balance	344 91
Total	<u>14,746 33</u>

201

Sept. 16 Deposit	19
17 "	11
" "	43 51
" "	253 51
18 "	541 28
22 "	907 02
" "	187 84

Sept. 16 Balance.....	344 91
-----------------------	--------

	2	Deposit	80				
	26	"	556 24				
	"	"	3 91				
	28	"	50 02				
	29	"	1 00				
	"	"	129 86				
	30	"	215 06				
Oct.	2	"	703 17				
	3	"	157 49				
	"	"	12				
	9	"	577 02				
	10	"	99 97	Oct.	15	Checks	4,576 36
	12	"	672 55	"		Balance	280 18
		Total	5,201 45			Total	5,201 45
Oct.	15	Balance	280 18				
	16	Deposit	561 15				
	"	"	4 41				
	19	"	135 42				
	"	"	274 59				
	23	"	530 83				
	24	"	142 21				
	27	"	946 82				
202							
Nov.	2	Deposit	9 78				
	"	"	509 80				
	"	"	377 54				
	"	"	106 51				
	5	"	239 72				
	13	"	329 10				
	"	"	1,000				
	14	"	337 76				
		Balance	152 20	Nov.	16	Checks	5,945 03
		Total	5,945 03			Total	5,945 03
Nov.	21	Deposit	409 45	Nov.	16	Balance	152 20
"	27	"	166 91				
Dec.	1	"	49 10				
	4	"	1,000				
	5	"	64 47				
	5	"	210 98				
	5	"	381 43	Dec.	8	Checks	2,117 56
	5	"	61 10			Balance	73 68
		Total	2,343 44	Dec.	8	Total	2,343 44
Dec.	8	Balance	73 68				
	9	Deposit	14 93				
	10	"	437 61				
	11	"	240 37				
	12	"	211 26				
	16	"	102 79				
	18	"	328 50				
	26	"	316 17				
1904.							
Jan.	2	"	446 09				
	5	"	26 20				
203							
	9	Deposit	259 44				
	11	"	78 37				
	12	"	1,245 48				
	14	"	415 45				
Jan.	22	Balance	77 40	Jan'y	22	Checks	4,273 74
		Total	4,273 74			Total	4,273 74

				1904.				
Jan.	23	Deposit	304 78	Jan.	22		77 40	
	29	"	394 13					
Feb.	1	"	104 35					
	8	"	283 50					
	12	"	16					
	13	"	217 27					
	"	"	95 60					
	18	"	1,000	Feb'y	26	Checks	2,361 53	
	20	"	346 51			Balance	323 21	
Total			2,762 14	Total			2,762 14	
1904.								
Feb'y	26	Balance	323 21					
	27	Deposit	390 83					
	"	"	141 78					
Mar.	7	"	387 61					
	14	"	366 56	Mar.	18	Checks	1,708 85	
	"	"	394 91			Balance	296 05	
			2,004 90				2,004 90	
Mar.	18	Balance	296 05					
	"	Deposit	374 30					
Apr.	1	"	751 58					
	2	"	247 36					
	9	"	373 42					
	11	"	173 20					
204								
	15	Deposit	450 97					
	18	"	130 51					
	22	"	450 73					
	25	"	100					
	29	"	426 85	Checks		3,042 89		
			3,774 97	Balance		732 08		
							3,774 97	
Apr.	30	Balance	732 08					
	30	Deposit	131 54					
May	11	"	94					
	14	"	990 19					
	"	"	154 17					
	16	"	321 57					
	20	"	430 32					
	"	"	164					
	23	"	311 06					
	26	"	1,253 97					
	27	"	325 07					
	"	"	20 08	May	31	Checks	2,998 06	
Total			4,928 05			Balance	1,929 99	
							4,928 05	
May	31	Balance	1,929 99					
	"	Deposit	484 90					
June	4	"	306 98					
	"	"	68 11					
	6	"	515 91					
	10	"	288 29					
	"	"	385 16					
	14	"	1,013 03					
	18	"	204 29					
	21	"	775 81	June	28	Checks	2,993 38	
205								
	25	Deposit	210 17			Balance	3,189 24	
Total			6,182 62	Total			6,182 62	

June	28	Balance.....	3,189 24		
	29	Deposit.....	761 74		
July	1	".....	221 59		
	2	".....	40 50		
	5	".....	128 40		
	5	".....	539 57		
	8	".....	213 34		
	11	".....	36 50		
	12	".....	667 90		
	13	".....	22 64		
	"	".....	8 20		
	15	".....	211 37		
	18	".....	60 04		
	"	".....	748 49	July 27	Checks..... 5,098 74
	22	".....	229 98		Balance..... 1,982 76
Total			7,079 50	Total	7,079 50
July	27	Balance.....	1,982 76		
	"	Deposit.....	7 41		
	"	".....	606 35		
	30	".....	239 23		
Aug.	1	".....	729 01		
	6	".....	213 01		
	"	".....	70		
	10	".....	520 28		
		Forward.....	4,368 05		
Aug.	13	".....	70		
	"	".....	234 63		
206					
	16	".....	684 59		
	19	".....	228 81		
	23	".....	549 85		
	26	".....	243 34	Aug. 30	Balance..... 2,339 50
	29	".....	596 38		Checks..... 4,636 15
Total			6,975 65	Total	
Aug. 30	Balance.....	2,339 50	Sept. 27	Check.....	3,723 54
Sept.	2	Deposit.....	238 92		
	6	".....	372 50		
	9	".....	312 88		
	12	".....	78		
	12	".....	188 68		
	14	".....	320 62		
	17	".....	139 88		
	19	".....	221 21		
	19	".....	315 67		
	24	".....	197 04		
	24	".....	318		Balance..... 1,319 36
Total			5,042 90	Total	5,042 90
Sept.	28	Balance.....	1,319 36		
	28	Deposit.....	316 73		
	30	".....	326 37		
Oct.	1	".....	236 85		
	3	".....	230 22		
	10	O† ✓†.....	105 67		
	10	O†.....	142 26		
	10	O†.....	334 21		
	13	O†.....	3 38		

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15	O†	339 33
17	O†	163 29
17	O†	154 80

Total 3,672 47

Oct. 24	Balance.....	146 30
	Checks.....	3,528 17

Total 3,672 47

Oct. 24	Balance.....	146 30
	O†	336 57
	O†	123
29	O†	129
31	O†	337 50
Nov. 2	O†	77 50
5	C†	362 62
5	O† √†	139 45
14	O†	429 98
17	O† √†	102

Balance..... 825 98

1904.

3,009 90

†3,009 90 Nov. 17. Balance overdrawn.. 825 98

208-212

EXHIBIT 12.

No. S. L. 28.

BERLIN, WIS., Oct. 21, 1904.

The Berlin National Bank

Pay M. Borth or order \$14.78 Fourteen & 78/100 Dollars.

THE JENNE CREAMERY CO.,

By JNO. W. BROWN, *Treas.*

[Written in ink across face:] Protested for non-payment Nov. 19, 1904. W. W. Crawford, Notary Public.

* * * * *

Name.	Amount.	Date.
J. Carpenter.....	\$5.90	Aug. 21, 1904
J. Carpenter.....	10.06	Oct. 21, 1904
J. Carpenter.....	12.69	Sept. 21, 1904
E. Tetzlaff.....	31.37	Oct. 21, 1904
E. Fuller.....	6.16	Oct. 21, 1904
S. Ryon.....	24.06	Oct. 21, 1904
G. Keehn.....	2.47	Oct. 21, 1904
C. Hall.....	4.11	Oct. 21, 1904
G. Pyncheon.....	21.64	Oct. 21, 1904
John Ring.....	27.74	Sept. 21, 1904
John Ring.....	32.02	July 21, 1904
O. A. Olson.....	15.56	Oct. 21, 1904
O. A. Olson.....	14.10	Sept. 21, 1904
O. A. Olson.....	13.51	Aug. 21, 1904
L. Erickson.....	6.09	Oct. 21, 1904
L. Erickson.....	11.38	Sept. 21, 1904

[† In pencil in copy.]

Name.	Amount.	Date.
L. P. Selsing.....	10.70	Oct. 21, 1904
Ole Tomson.....	24.31	Oct. 21, 1904
A. Selsing.....	27.56	Oct. 21, 1904
M. Carpenter.....	21.28	Oct. 21, 1904
M. Carpenter.....	20.77	Sept. 21, 1904
L. Taylor.....	23.10	Oct. 21, 1904
A. Terrill.....	14.43	Oct. 21, 1904
L. Hesick.....	7.29	Oct. 21, 1904
A. Betkie.....	3.87	May 21, 1904

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EXHIBIT 18.

Checks.

Spring Lake Butter & Cheese Company:

E. Fuller.....	6.16
T. Ryan.....	26.45
M. Booth.....	17.42
E. Tetzlaff.....	31.37
I. Carpenter.....	5.90
" ".....	10.06
" ".....	12.69
G. Pyncheon.....	21.64
C. Hall.....	4.11
G. Keehn.....	2.47

Terrill Dairyman Association:

M. Carpenter.....	21.28	42.05
" ".....	20.77	
A. Terrill.....		14.43
L. Taylor.....		23.10

Black Creek Dairy Association:

L. Hesick.....	7.29
----------------	------

Neshkoro Station (name not known):

John Ring.....	27.74	59.76
" ".....	32.02	

Mount Morris & Marion Butter & Cheese Company:

L. Erickson.....	6.09	17.47
" ".....	11.38	
A. Selsing.....		27.56
O. A. Oleson.....	15.56	43.17
" " ".....	14.10	
" " ".....	13.51	
Ole Thomson.....		24.31
L. P. Selsing.....		13.34

Golden-rod Creamery (name not known):

A. Betkie.....	3.87
----------------	------

414.62

214-233

EXHIBIT 19.

(I. Before Commissioner Wood.)

Jenne Creamery Co.

Statement.

Spring Lake Creamery.

Seneca Station.

For month of Oct., 1904.

Total No. lbs. Milk 234307.

Total No. lbs. butter fat 10724.4

Total No. lbs. butter made 10829.

Average Test 4.56.

Total amount received \$2286.36.

Average price butter, 21.1 cts.

Average price butter fat 17.7 cts.

Patron Jno. Shroader.

Cr. 2229 lbs. milk at test 5.35%.

121.9 lbs. butter fat at 17.7, \$21.56.

To 19¾ lbs. butter Dr. at 21.1, \$4.17.

To ————

Check to balance \$17.39.

(Here follow 28 statements in the same form as that above and being precisely similar down to the name of the patron and all being parts of said Exhibit 19 and the following is the statement of said 28 additional statements for the different patrons.)

Patron Mrs. Zietlow.

Cr. 1975 lbs. milk at test 5.85%.

115.5 lbs. butter fat at 17.7 \$20.43.

Check to balance \$20.43.

Patron N. Marks.

Cr. 880 lbs. milk at test 6.05%.

53.2 lbs. butter fat at 17.7 \$9.41.

Check to balance \$9.41.

* * * * *

234 Each of the envelopes in Exhibits 19 to 29 both inclusive have in red ink on the back the computation of the amount due the patron as per prices per pound for butter fat as determined by computation shown in Exhibits 32 and 33.

235 Exhibit 30 consists of fifteen milk sheets as follows:

236

(EXHIBIT 30.)

Milk Sheet.

D. J. Jenne & Co. Terrill Factory. Month of October, 190-

	9	11	12	10	13	9	8	9	10	12	12
Names.	2	4	6	8	10	12	14	16			
1. A. Morson.....	225	235	214	217	208	189	180	182	1650		
	*	*	*	*	*		*		*		

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Milk Sheet.

D. J. Jenne & Co. Terrill Factory. Month of Nov., 1904.

*	*	*	*	*	*	*
---	---	---	---	---	---	---

238

Terrill, Oct.

*	*	*	*	*	*	*
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239

Milk Sheet.

D. J. Jenne & Co. M. & M. Factory. Month of Oct., 1904.

*	*	*	*	*	*	*
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240

Milk Sheet.

D. J. Jenne & Co. Black Creek Factory. Month of October, 1904.

*	*	*	*	*	*	*
---	---	---	---	---	---	---

241

Milk Sheet.

D. J. Jenne & Co. Seneca Factory. Month of Oct., 1904.

*	*	*	*	*	*	*
---	---	---	---	---	---	---

242

Milk Sheet.

D. J. Jenne & Co. Seneca Factory. Month of November, 1904.

*	*	*	*	*	*	*
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243

Milk Sheet.

D. J. Jenne & Co. Seneca Factory. Month of Oct., 1904.

*	*	*	*	*	*	*
---	---	---	---	---	---	---

244

Milk Sheet.

D. J. Jenne & Co. Terrill Factory. Month of October, 1904.

*	*	*	*	*	*	*
---	---	---	---	---	---	---

245 *Milk Sheet.*

D. J. Jenne & Co. Spring Lake Factory. Month of October, 1904.

* * * * *

246 & 247 *Milk Sheet.*

D. J. Jenne & Co. M. & M. Factory. Month of Oct., 1904.

* * * * *

248 *Milk Sheet.*

D. J. Jenne & Co. Spring Lake Factory. Month of October, 1904.

* * * * *

249 *Milk Sheet.*

D. J. Jenne & Co. Spring Lake Factory. Month of October, 190-.

* * * * *

250 *Milk Sheet.*

D. J. Jenne & Co. M. & M. Factory. Month of Oct., 1904.

* * * * *

(Endorsed :) 12-30.

251-259 These milk sheets marked exhibit 30 were all that were furnished by S. B. Stedman, the assignee who was subpoenaed by subpoena *duces tecum* to produce the same, and none other were furnished by defendants although notice to produce was duly given.

EXHIBIT 32.

Sales of November Butter as Shown by Plaintiffs' Exhibit E and Exhibits J, M, N, O, & P.

Nov. 8. Sold Thomas C. Jenkins, Pittsburg, 1423* at 24½c.....	348.63
" 15. " " " 618* " ".....	151.41
\$2.00 out } " " " 437½, 24½c.....	108.28
Nov. 15. " " " 400* at 25½c.....	102.00
Nov. 8. Sold S. Ewart & Co. 320* at ".....	81.60
" 15. " " ".....	
	<hr/>
	\$791.92
Sold Louie Kolpine.....	\$.56
" Fred Kolpine.	2.38
" Louie Leasnake.....	2.25
" L. Abel.....	1.13
" W. Sexton.....	6.31
" C. Lamue.....	3.63
" C. Lamue for H. Hefernon.....	.25
" H. Luhn.....	4.31
" J. Joslin.....	1.00
" O. B. Marr.....	1.38
" J. Emigh.....	1.25
" P. Morson.....	2.13
" Ed. Leach.....	2.63
" Ed. Spurbeck.....	1.63
" G. Pyncheon.....	.13
" F. Jennings.....	2.56
	25c.....
21*.....	"
9½*.....	"
9*.....	"
4½*.....	"
25½*.....	"
14½*.....	"
1*.....	"
17½*.....	"
4*.....	"
5½*.....	"
5*.....	"
8½*.....	"
10½*.....	"
6½*.....	"
1½*.....	"
10½*.....	"

" E. Fuller.....	7½*	25c.	1.88
" J. Godson.....	9½*	"	2.38
" C. Hall.....	9½*	"	2.31
" J. Carpenter.....	8*	"	2.00
" H. Monshowski.....	3½*	"	.88
" J. Jennings.....	3½*	"	.94
" E. Tetzlaff.....	2*	"	.50
" G. Kuhn.....	5*	"	1.25
" G. Rhoda.....	5*	"	1.25
" O. A. Olson.....	1½*	"	.38
" J. Leach.....	4*	"	1.00
" C. Elleckson.....	3½*	"	.94
" L. P. Selsing.....	6½*	"	1.69
" O. L. Atkins.....	4½*	"	1.13
" V. E. Scoville.....	7½*	"	1.94
" H. Olson.....	7½*	"	1.81
" Wm. Hayes.....	7*	"	1.75
" C. P. Wilson.....	10½*	"	2.56
" L. Bednareck.....	2½*	"	.63
" J. Washkowitz.....	4*	"	1.00
" L. Washkowitz.....	1*	"	.25
" E. Morson.....	2½*	"	.63
" Chas. Brigham.....	4½*	"	1.13
" Geo. Tice.....	2½*	"	.63
" M. Percy.....	4½*	"	1.13
" M. Lungwitz.....	4½*	"	1.06
" J. W. Briggs.....	4½*	"	1.06
" Fay Waite.....	7½*	"	1.81
" H. Lamue.....	2*	"	.50

Sold O. B. Marr	71*	.....	21.1c.	.....	1.64
" J. Emigh	141*	.....	"	.....	3.01
" P. Morson	271*	.....	"	.....	5.80
" Ed. Leach	331*	.....	"	.....	7.07
" Ed. Spurbeck	151*	.....	"	.....	3.27
" G. Pyncheon	5*	.....	"	.....	1.06
" F. Jennings	241*	.....	"	.....	5.17
" E. Fuller	19*	.....	"	.....	4.01
Sold J. Godson	181*	.....	"	.....	3.85
" C. Hall	161*	.....	"	.....	3.48
263-273 " J. Carpenter	431*	.....	"	.....	9.13
Sold H. Monshowski	201*	.....	"	.....	4.33
" J. Jennings	4*	.....	"	.....	.84
" E. Tetzlaff	81*	.....	"	.....	1.79
" G. Keehn	131*	.....	"	.....	2.85
" G. Rhoda	8*	.....	"	.....	1.69
" S. Ryon	61*	.....	"	.....	1.32
" G. Slobenski	51*	.....	"	.....	1.21
" L. Masada	41*	.....	"	.....	1.00
" P. Ward	91*	.....	"	.....	2.00
" J. Washkowitz	5*	.....	"	.....	1.06
" S. Washkowitz	11*	.....	"	.....	.32
" A. Bednarick	3*	.....	"	.....	.63
" L. Bednarick	6*	.....	"	.....	1.27
" Fred Kolpine	191*	.....	"	.....	4.06
" Louie Kolpine	201*	.....	"	.....	4.27
" H. Yantz	91*	.....	"	.....	1.95
" Theo. Yantz	91*	.....	"	.....	1.95
" Louie Leasnake	10*	.....	"	.....	2.11

"	L. Abel.....	4 *	.....	.....	.84
"	Jno Shroader.....	19 1/2 *	.....	.....	4.17
"	M. Lungwitz.....	9 *	.....	.....	1.90
"	Hans Rasmussen.....	4 1/2 *	.....	.....	1.00
"	J. W. Briggs.....	18 1/2 *	.....	.....	3.90
"	Fay Waite.....	9 1/2 *	.....	.....	2.00
"	H. Lamue.....	3 1/2 *	.....	.....	.79
"	A. Terrill.....	12 1/2 *	.....	.....	2.64
"	H. Tice.....	16 *	.....	.....	3.38
"	L. W. Chipman.....	9 1/2 *	.....	.....	2.00
"	Otto Lungwitz.....	10 *	.....	.....	2.11
"	A. Morson.....	23 *	.....	.....	4.85
"	M. Percy.....	14 1/2 *	.....	.....	3.01
"	Geo. Tice.....	14 1/2 *	.....	.....	3.11
"	Chas. Brigham.....	4 1/2 *	.....	.....	.95
"	E. Morson.....	8 1/2 *	.....	.....	1.85
"	J. E. Van Buren.....	4 1/2 *	.....	.....	1.00
"	A. Walters.....	19 1/2 *	.....	.....	4.11
					<hr/>
					\$191.42
					2,258.58
					<hr/>
Total.....					\$2,450.00
					407.24 239/312
					<hr/>
Net.....					\$2,042.75 73/312

\$2,042.75 ÷ 10,724.4 (amount of Oct. butter fat)=19c. per lb. for October butter fat.

274-276 For value received, I hereby sell, assign and transfer unto O. L. Atkins an undivided one-half of all my claim, right, title and interest in and to all the money received by the Jenne Creamery Company on account of the sale by said Creamery Company of my butter manufactured from my milk delivered by me to the Jenne Creamery Company, to be manufactured into butter, at the factory of the Spring Lake Butter and Cheese Company between the 1st day of October, 1904, and the 15th of the following November, which said money is now withheld from me by said Jenne Creamery Company and is now or should be in the possession of the said Jenne Creamery Company for me, together with all right of action to sue for and collect said sum of money in such manner and in such form as said O. L. Atkins may elect.

In witness whereof I have hereunto set my hand and seal this 16th day of January A. D. 1905.

JNO. H. EMIGH. [SEAL.]

In presence of
W. SEXTON.
H. J. SOULE.

* * * * *

277-280 For value received, I hereby sell, assign and transfer unto John Emigh one half of all my claim, right, title and interest in and to all the money received by the Jenne Creamery Company on account of the sale by said Company of my butter manufactured from my milk delivered by me to the said Jenne Creamery Company, to be manufactured into butter, at the factory or station of the Mt. Morris and Marion Butter and Cheese Company, between the 1st day of October, 1904, and the 15th day of the following November, which said money is now withheld from me by said Jenne Creamery Company and is now or should be in the possession of the said Jenne Creamery Company for me, together with all rights of action thereon to sue for and collect said money in such manner and in such form as the said John Emigh may elect.

In witness whereof I have hereunto set my hand and seal this 16th day of January A. D. 1905.

O. L. ATKINS. [SEAL.]

In presence of
H. J. SOULE.
V. E. SCOVILLE.

* * * * *

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EXHIBIT 39.

For value received, the Marion & Mt. Morris Butter & Cheese Company hereby sells, assigns, sets over, and transfers unto John Emigh and O. L. Atkins all its claim, right, title and interest in and to the money received by the Jenne Creamery Company on account of the sale of butter manufactured from milk delivered at its factory by the different patrons thereof, between the 1st day of April, 1904, and the 15th day of the following November, together with all rights of

action to sue for and collect said money in such manner and in such form as said John Emigh and O. L. Atkins may elect.

In witness whereof the said Marion & Mt. Morris Butter & Cheese Co. has caused these presents to be signed by its President and Secretary, and the impression of its corporate seal to be hereunto affixed, this — day of January A. D. 1905.

MARION & MT. MORRIS,
By ANDREW ARVESON,
President, and
V. E. SCOVILLE, *Secretary.*

In presence of
L. ERIKSEN.
H. GAYLORD.

282 For value received, the Spring Lake Butter & Cheese Co. hereby sells, assigns, sets over, and transfers unto John Emigh and O. L. Atkins all its claim, right, title and interest in and to the money received by the Jenne Creamery Company on account of the sale of butter manufactured from milk delivered at its factory by the different patrons thereof, between the *kst* day of April 1904, and the 15th day of the following November, together with all rights of action to sue for and collect said money in such manner and in such form as said John Emigh and O. L. Atkins may elect.

In witness whereof the said Spring Lake Butter & Cheese Company has caused these presents to be signed by its President and Secretary, and the impression of its corporate seal to be hereunto affixed, this — day of January A. D. 1905.

SPRING LAKE BUTTER & CHEESE CO.,
By WALTER H. SEXTON, *President, and*
GEO. W. PYNCHON, *Secretary.*

In presence of
H. J. SOULE.
O. B. MARR.

283 For value received, the Terrill Dairyman's Association hereby sells, assigns, sets over, and transfers unto John Emigh and O. L. Atkins all its claims, right, title and interest in and to the money received by the Jenne Creamery Company on account of the sale of butter manufactured from milk delivered at its factory by the different patrons thereof, between the 1st day of April 1904, and the 15th day of the following November, together with all rights of action to sue for and collect said money in such manner and in such form as said John Emigh and O. L. Atkins may elect.

In witness whereof the said Terrill Dairyman's Association has caused these presents to be signed by its President and Secretary, and the impression of its corporate seal to be hereunto affixed, this — day of January A. D. 1905.

TERRILL DAIRYMAN'S ASSOCIATION,
By L. W. CHIPMAN, *President, and*
CHAS. TICE, *Secretary.*

In presence of
H. J. SOULE.

284 For value received, the Black-creek Dairy Association hereby sells, assigns, sets over, and transfers unto John Emigh and O. L. Atkins all its claim, right, title and interest in and to the money received by the Jenne Creamery Company on account of the sale of butter manufactured from milk delivered at its factory by the different patrons thereof, between the 1st day of April, 1904, and the 15th day of the following November, together with all rights of action to sue for and collect said money in such manner and in such form as said John Emigh and O. L. Atkins may elect.

In witness whereof the said Black-creek Dairy Association has caused these presents to be signed by its President and Secretary, and the impression of its corporate seal to be hereunto affixed this 17th day of January A. D. 1905.

BLACK-CREEK DAIRY ASSOCIATION,
By ANTONI KLAPPA, *President*, and
L. MASLINDA, *Secretary*.

In presence of

H. J. SOULE.
I. KLAPPA.

285-288 For value received, the Seneca Cheese Factory Co. hereby sells, assigns, sets over, and transfers unto John Emigh and O. L. Atkins all its claim, right, title and interest in and to the money received by the Jenne Creamery Company on account of the sale of butter manufactured from milk delivered at its factory by the different patrons thereof, between the 1st day of April, 1904, and the 15th day of the following November, together with all rights of action to sue for and collect said money in such manner and in such form as said John Emigh and O. L. Atkins may elect.

In witness whereof the said Seneca Cheese Factory Co. has caused these presents to be signed by its President and Secretary, and the impression of its corporate seal to be hereunto affixed, this 17th day of January A. D. 1905.

SENECA CHEESE FACTORY CO.,
By ED. FINN, *Vice-President*, and
JAMES LEIGH, *Secretary*.

In presence of

WM. F. ZUEHLKE.
LOUIS KOLPIN.

* * * * *

289 Said Court thereafter made and filed its findings of fact and conclusions of law as follows:

290

In Circuit Court, Green Lake County.

JOHN EMIGH and O. L. ATKINS, Plaintiffs,

vs.

P. R. EARLING, as Receiver of the Berlin National Bank; THE BERLIN National Bank, The Jenne Creamery Company, and J. W. Brown, Defendants.

At a regular term of the circuit court for the county of Green Lake, held at the court house in the village of Dartford, in said county of Green Lake, beginning on the first Tuesday after the third Monday in June, A. D. 1905.

Present: Hon. Chester A. Fowler, Circuit Judge Presiding.

This action being regularly on the calendar for trial at the June term, A. D. 1905, of the circuit court in and for the county of Green Lake, and the action having been by stipulation dismissed as to the defendant, J. W. Brown, and the issues herein coming on for trial by the court without a jury at said term, and on the 6th day of July, A. D. 1905, and the trial thereof having been duly had, the plaintiff appearing by E. F. Kileen, their attorney, and Thompson, Thompson & Pinkerton, of counsel, and the defendants appearing by Perry Niskern, their attorney, and The Jenne Creamery Company being in default, as appears by the affidavit of E. F. Kileen on file herein, and the court having heard the evidence offered and received, in open court, and the arguments of counsel thereon, and being advised in the matter, does now here give its decision in writing, the judge stating in his decision separately the facts found by him and his conclusions of law thereon, to wit:

Findings of Fact.

1.

That the defendant, the Jenne Creamery Company, since the month of March, 1902, has been and is a corporation having its principal place of business at Berlin, Wisconsin.

2.

That at all the times hereinafter mentioned the defendant, The Berlin National Bank, was and is now a national banking corporation organized and incorporated under the laws of the United States of America, and until its closing, as hereinafter found, doing business as a national bank at Berlin, Wisconsin.

3.

That said Jenne Creamery Company, after its organization, continued and carried on the business formerly conducted by a partnership known as D. J. Jenne and Company.

4.

The Jenne Creamery Company was not successful financially and in the first part of October, 1902, were on the verge of bankruptcy.

At that time D. J. Jenne, one of the firm of D. J. Jenne & Company, owed the defendant bank \$2,200.00, the firm of D. J. Jenne & Company owed it \$5,000.00, D. J. Jenne owed individually to others at least \$2,600.00.

The Jenne Creamery Company had an overdraft at the defendant bank, and it had drawn and issued checks, then outstanding, against the defendant bank for the amount, as they then estimated, of \$5,000.00 which amount, as a matter of fact, it overran, amounting to about \$8,000.00.

5.

D. J. Jenne and S. H. Jenne, who composed the partnership of D. J. Jenne & Company, owned all the stock of the Jenne Creamery Company, and the entire assets of the Jennes individually, as a partnership, and of the corporation, were less than the amount of their indebtedness. The defendant bank was a creditor of the Jennes individually, and of the firm and the corporation, to the extent of more than \$7,200.00 in addition to the checks drawn by the Jenne Creamery Company against the defendant bank which were then outstanding and unpaid.

6.

The Jennes, at that time (fall of 1902), explained fully their condition to the defendant bank, through its officers and directors. Special conferences were had between the Jennes and the bank's officers and directors, and the Jennes proposed that the defendant bank take the property of the Jennes individually, as a firm, and of the corporation, and dispose of it, and see what salvage they could get out of it, and informed the defendant bank that unless
292 their affairs could be liquidated for them in some such manner they would have to go into bankruptcy, and that they were unable to pay their debts.

7.

None of the officers or directors of the defendant bank had any personal or financial interest in the Jenne Creamery Company, or the firm of J. D. Jenne & Company, or the individual Jennes, except through and because of their interest as stockholders, directors or officers of the defendant bank.

8.

At that time (fall of 1902) an arrangement was made between the Jennes and the defendant bank, acting through its officers and directors, whereby the Jennes assigned all the stock in the Jenne Creamery Company to Brown, the cashier, Foster, the president, and Steadman, the assistant cashier of the defendant bank, and these three officers and directors of the defendant bank became the stockholders, directors and officers of the Jenne Creamery Company, and they held all the outstanding stock of the Creamery Company, the stock being assigned by the Jennes directly to Foster, Steadman and Brown.

9.

D. J. Jenne and S. H. Jenne also assigned and transferred, about the same time, all their property and effects, individually and as partners, real and personal, to J. W. Brown, the cashier of the defendant bank, who realized therefrom the sum of \$4,000.00; \$1,400.00 of which was paid to the defendant bank, and the rest paid to other creditors of the Jennes individually.

10.

That under said arrangement between the Jennes and the defendant bank, through its said officers and directors, who became the stockholders, officers and directors of the Jenne Creamery Company, had the management and control and running of the business of the Jenne Creamery Company, and honored and paid the outstanding checks of the Jenne Creamery Company drawn against the defendant bank, and furnished money to continue the business, 293 and it was hoped and expected that there would be some profit in the running and carrying on of the Jenne Creamery Company's business, which was to be applied on the indebtedness of the Jenne Creamery Company and the Jenne partnership and the Jennes individually; the defendant bank being the main creditor, and after the cashing or payment of the Creamery Company's outstanding checks, being the main, if not the only creditor of that corporation.

11.

That said arrangement was made in the interests of the defendant bank, and with its full knowledge and consent, and it, through its officers and directors, participated therein and was a party thereto.

12.

That the business theretofore carried on by the Jenne Creamery Company, and thereafter carried on in its name under the arrangement hereinbefore found, consisted in the making and selling of butter and other dairy products from milk furnished to it by dairymen in different parts of Green Lake, Marquette and Waushara counties in the state of Wisconsin, and that theretofore and thereafter the Jenne Creamery Company, conducted as aforesaid, entered into agreements with the Marion & Mount Morris Butter & Cheese Company, and the Tyrell Dairymen's Association, and the Spring Lake Butter & Cheese Company, and the Black Creed Dairy Association, and the Seneca Cheese factory, and others, being different creamery companies, in the said counties, whereby it leased their creamery buildings and apparatus and agreed to operate the same as skimming stations, and, for value, expressly agreed with them that it would make butter for the patrons of such factories for $3\frac{1}{2}\text{¢}$ per pound, when butter should sell for 17¢ or over, and 3¢ per pound when butter should sell for less than 17¢, and that it would bear all expenses of manufacturing and selling, and after deducting its said compensation, charge or commission for making said butter, would pay over and distribute to said patrons the proceeds thereof.

13.

That said provisions in said agreements with said local creamery companies were made for the benefit of their respective
294 patrons, and that like arrangements were also made by said Jenne Creamery Company with the patrons of said respective creamery companies, which said agreements were to the effect that the said Jenne Creamery Company should take the milk of said patrons and determine the amount of butter fat therein, and make the same into butter in a good and workmanlike manner, and sell the same for said patrons, and after deducting their $3\frac{1}{2}\text{¢}$ of 3¢ per pound for making, dependent on the price at which said butter sold, to pay the remainder of the proceeds thereof to the said patrons severally, and that in determining the amount of the proceeds to which each patron was entitled the total proceeds from the sales of butter for each month were to be divided by the number of pounds of butter fat contained in the milk furnished by the patrons from which said butter was made, and the price so ascertained was to be used in determining the proportion of the proceeds of the sale of said butter belonging to each patron individually, which proceeds were thereupon to be turned over to the several patrons upon the making of such computation.

14.

That the said patrons who furnished the milk from which the butter was made were at all times, under said arrangements, the beneficial and equitable owners of the same and of the products thereof and of the proceeds derived from the sale of such products.

15.

That during the month of October, 1904, the patrons named in sub-division 5 of the plaintiff's complaint herein delivered to the Jenne Creamery Company, run, conducted and managed as aforesaid, the respective number of pounds of milk, containing the respective number of pounds of butter fat, as therein stated and alleged, and the allegations of said sub-division 5 of the plaintiff's complaint herein is a true and correct statement of the amount of milk furnished by each of said patrons during said month of October, 1904, and of the number of pounds of butter fat contained in the milk furnished by each of said patrons during said month.

That from the milk so furnished in the month of October, A. D. 1904, there was made and sold a total of 11,635 $\frac{3}{4}$ pounds of
295 butter, which was sold for the sum of \$2,450.00. The $3\frac{1}{2}\text{¢}$ per pound to which the Jenne Creamery Company was entitled under the arrangement on 11,635 $\frac{3}{4}$ pounds amounted to \$407.25, leaving \$2,042.75 belonging to and to be apportioned among the October patrons. The total amount of butter fat in the milk delivered that month was 10,724.4 pounds, and each patron was entitled to 19¢ for each pound of butter fat in the milk delivered by him during said month.

Said October patrons had and received in the aggregate during said month of the butter made by the Jenne Creamery Company for

their own use 908 $\frac{1}{4}$ pounds amounting at 21.1¢ per pound to a total of \$191.42. Said patrons under the arrangement allowing the Jenne Creamery Company credit for the butter received by them for their own use during each month at the average price obtained on the cash sales of the balance of the butter. This leaves the sum of \$1,851.33 as the net amount of the proceeds which the October patrons were entitled to receive, and of which they were the beneficial and equitable owners.

16.

That during the first half of the month of November, 1904, the patrons named in sub-division 6 of the plaintiff's complaint herein delivered to the Jenne Creamery Company, run, conducted and managed as aforesaid, the respective number of pounds of milk, containing the respective number of pounds of butter fat as therein stated and alleged and the allegations of said sub-division 6 of the plaintiff's complaint herein is a true and correct statement of the amount of milk furnished by each of said patrons during the first half of said month of November, 1904, and of the number of pounds of butter fat contained in the milk furnished by each of said patrons during said time.

That from the milk so furnished in the first half of the month of November, A. D. 1904, there was made and sold a total of 3,508 $\frac{1}{4}$ pounds of butter, which was sold for the sum of \$869.44. The 3 $\frac{1}{2}$ ¢ per pound to which the Jenne Creamery Company was entitled under the arrangement on 3,508 $\frac{1}{4}$ pounds amounted to \$122.79, leaving \$746.65 belonging to and to be apportioned among the
296 patrons for the first half of November. The total amount of butter fat in the milk delivered during that time was 3,830 pounds, and each patron was entitled to 19.4¢ for each pound of butter fat in the milk delivered by him during said time.

Said November patrons had and received in the aggregate during said time of the butter made by the Jenne Creamery Company for their own use, 309 $\frac{3}{4}$ pounds, amounting at 25¢ per pound to a total of \$77.52. Said patrons under the arrangement allowing the Jenne Creamery Company credit for the butter received by them for their own use during each month, at the average price obtained on the cash sales of the balance of the butter. This leaves the sum of \$669.13 as the net amount of the proceeds which the said November patrons were entitled to receive, and of which they were the beneficial and equitable owners.

17.

The proceeds of the sales of butter in October and November were in the form of checks and drafts from the purchasers.

18.

\$102.00 of the proceeds of the November butter was a check from S. Ewart & Company received November 17, 1904, by the bank examiner and listed among the checks in the possession of the defendant receiver, and went directly into the hands of the defendant receiver and was collected and retained by him.

\$81.60 of the proceeds of the November butter was a check of S. Ewart & Company received by the defendant receiver, on November 28, 1904, and collected and retained by him.

\$257.69 of the proceeds of the November butter was a check of Thomas C. Jenkins received by the defendant receiver on November 28, 1904, and collected and retained by him.

\$470.62 of the proceeds of the October and November butter, (being October butter \$124.99, November \$348.63), was a check of Thomas C. Jenkins received by the defendant receiver on November 22, 1904, and collected and retained by him.

19.

297 There was also received as the proceeds of the shipments of October butter by the defendant bank a draft from Thomas C. Jenkins for \$337.50, which draft was received by the Berlin bank October 31, 1904, and was sent for collection and credit to its correspondent, the First National Bank of Milwaukee, and received by it November 1, 1904, and shortly thereafter collected by said Milwaukee bank, and said sum of \$337.50 remained continuously in said correspondent bank until after the appointment of a receiver for the defendant, when the same, with other moneys in said Milwaukee bank, belonging to the defendant bank, were turned over to the defendant receiver. The total amount turned over by the Milwaukee bank to the defendant receiver being about \$1,800. From the time the Milwaukee bank received said draft until it turned over the funds in its hands to the defendant receiver, it always had on hand a balance in favor of the Berlin bank greater than the amount of the Jenkins draft, received by it, which balance at all times contained and included the said draft, or the proceeds thereof, and the turning over thereof to the defendant receiver increased and swelled the assets coming into said receiver's hands by the amount thereof.

20.

There were also received as the proceeds of the shipments of October and November butter by the defendant bank the following checks or drafts, to wit:

Check from S. Ewart & Co. for October butter, \$123.00, received by the Berlin National Bank October 24th, 1904; also check from S. Ewart & Co. for October butter \$129.00, received by the Berlin National Bank October 28th, 1904; also check from S. Ewart & Co. for October butter, \$77.50, received by the defendant bank November 2, 1904, and also check from S. Ewart & Co. for October butter \$139.45, received by the defendant bank November 5, 1904, and all of which said checks were sent by the defendant bank to its correspondent, the Hanover National Bank of New York city within a day or two after the receipt of each check, for collection and credit. The New York bank received said checks in due course of mail and shortly thereafter collected the same and the moneys collected thereon, being the amount of the face thereof, remained continuously in said Hanover National Bank until after the appointment of the receiver of the defendant bank, when the

298

same with other moneys in said Hanover National Bank, belonging to the defendant bank, were turned over to the defendant receiver.

The total amount turned over by the Hanover National Bank to the defendant receiver being \$3,100. From the time the Hanover National Bank received said checks from the defendant bank until it turned over the funds in its hands to the defendant receiver it always had on hand a balance in favor of the Berlin bank greater than the amount of the said checks so received and collected by it as herein found, which balance at all times contained and included the said checks or the proceeds thereof, and the turning over thereof to the defendant receiver increased and swelled the assets coming into said receiver's hands by the amount thereof.

21.

There were also received as the proceeds of the shipments of October and November butter by the defendant bank the following checks or drafts, to wit:

From George Middendorf & Co. \$105.67 (of which \$22.21 was for October butter, the balance \$83.46 for a Sept. shipment), received by the defendant bank October 10, 1904; also from George Middendorf & Co. \$163.29 for October butter, received by the defendant bank October 17, 1904; also a check from Thomas C. Jenkins for October butter \$336.57, received by the Berlin National Bank October 24, 1904; also check from Thomas C. Jenkins for October butter \$362.62, was received by the Berlin National Bank November 5, 1904; also check from Thomas C. Jenkins for October butter \$429.98, received by the defendant bank November 14, A. D. 1904, and all of which said checks and drafts were sent by the defendant bank to its correspondent, the First National Bank of Chicago, at the city of Chicago and state of Illinois, within a day or two after the receipt of each check by the defendant bank for collection and credit. The said Chicago correspondent bank received said checks in due course of mail, and shortly thereafter collected the same and retained the proceeds thereof, amounting to a sum equal to the face thereof. All the items except the last check above mentioned were collected by the correspondent bank prior to the 17th day of November, A. D. 1904. The last check for \$429.98 was received by the Chicago bank on November 16th, 1904, and was a Pittsburg check and in the usual course of business could not have been collected by the Chicago bank until 3 or 4 days thereafter.

There was at all times, after the receipt of said checks, in the First National Bank of Chicago to the credit of the defendant bank a much larger balance than the amount of the checks for butter received by it from the defendant bank. At the close of business on the 16th of November, A. D. 1904, the First National Bank of Chicago had in its hands funds for the defendant bank to the amount of \$4,835.64, or more.

On the 17th day of November, A. D. 1904, at the request of the defendant bank, the First National Bank of Chicago remitted from the funds in its hands \$3,000.00 in currency to the defendant bank, an amount larger than all of the October and November butter

checks and drafts which had been sent to the Chicago bank. Said currency was placed by the defendant bank in its safe in its vaults, and mingled with its other moneys there.

At the time of the failure of the defendant bank, there still remained in the hands of the First National Bank of Chicago, including the said check for \$429.98 subsequently collected by it, a balance of over \$2,240.29. Said Chicago bank held certain notes of the defendant bank, which were secured by collaterals in value exceeding the amount of said notes with interest. The Chicago bank claimed the right to retain any balance in its hands and apply it on the said notes, and after the appointment of the defendant receiver he settled up said matter with the Chicago bank, paying them the balance on the defendant bank's notes. And the collateral theretofore held by the Chicago bank thereupon passed into the hands of the defendant receiver, and the same was of greater value than the total amount of the indebtedness of the defendant bank to the Chicago bank, for which it had deposited it as collateral.

300 That thereby the assets coming into the receiver's hands and the funds received by him were enlarged and increased by the amount of the balance in the Chicago bank's hands at the time of the failure, being the sum of \$2,240.29 or more, and the said defendant receiver had the full benefit and use thereof, and received the proceeds thereof.

22.

The defendant bank kept its cash in a safe in its vault in the bank, except so much as was taken out daily for use on the counters, and at all times from the first day of October, 1904, down to the closing of the bank had cash in its vaults exceeding in amount at all times the amounts received by it as hereinbefore found from the sale of the shipments of October and November butter in the year 1904, and at the time of the failure of the defendant bank there was on hand cash to the amount of \$2,281.46, which was turned over to the bank examiner and by him delivered to the defendant receiver, who had and retains the same.

23.

The proceeds of the shipments of the butter made during the month of October and the first half of November, 1904, received by the defendant bank as hereinbefore found, were not paid out by it, and the drafts drawn on its correspondent banks (which received and had the checks or drafts, and the proceeds thereof, received for shipments of said butter), were not paid out of the proceeds of said butter in their hands but out of the other funds of the defendant bank in their hands against which said drafts could properly be drawn.

24.

That the defendant bank, through its officers and directors, in running and conducting and carrying on, in the interest of said bank, the business of the Jenne Creamery Company, as herein found, took the milk furnished by the patrons in the months of April, June, July, August and September, 1904, and made the same into butter,

and sold the same, and collected the proceeds thereof, and placed the same in the defendant bank, and that said proceeds so received by the defendant bank rightfully and equitably and beneficially belonged to and was the property of the patrons who furnished said milk during said months, as the defendant bank well knew. That said defendant bank, and its said officers and directors, computed the division and distribution of said proceeds among the patrons entitled thereto, and caused to be issued therefor checks drawn in form, in the name of the Jenne Creamery Company, and signed by Brown, the defendant bank's cashier, and drawn on said bank, and such checks evidenced and showed the proportion of the proceeds belonging to each of the several patrons therein named.

That said proceeds of the shipments of said butter during said months were received by the defendant bank, and as the defendant bank well knew belonged beneficially and equitably to said patrons; and, after the computation of the respective amounts due each patron, the said bank held said proceeds for each of said patrons severally to the amount of his separate interest therein, being the amount shown by his check or checks which was payable by said defendant bank to each of said patrons on the presentment of said check or checks.

25.

That a number of the patrons furnishing milk during said months of April, June, July, August and September, 1904, did not present their checks prior to the closing of the bank, and that said patrons have not received from the defendant bank, or any other source, their respective shares of the proceeds of the sale of said butter for said months, and that the defendant bank is liable to the present owners of said checks and claims for the respective share of the proceeds of said butter for said months which belonged to each of said patrons on the computation of the division and distribution thereof, and as evidenced and shown by said checks.

That the following patrons delivered milk during said months, and on a distribution of the proceeds from the sale of the butter made therefrom became entitled to receive severally from the defendant bank the amount of the proceeds of said butter received by said bank, to the amount set opposite their respective names below, being the amount as evidenced and shown by the checks made and delivered as hereinbefore found, and no part of which has been paid, to wit:

302	A. Betky.....	\$3.87
	T. Ryan.....	24.08
	E. Fuller.....	6.16
	L. Hesick.....	7.29
	L. Taylor.....	23.10
	A. Terrill.....	14.43
	G. Kuhn or King.....	2.47
	C. Hall.....	4.11
	G. Pyncheon.....	21.64

M. Booth.....	14.78
E. Letzlaff.....	31.37
A. Selsing.....	27.56
Ole Thomson	24.31
L. P. Selsing.....	10.70
John Ring.....	59.76
J. Carpenter.....	28.65
M. Carpenter.....	42.05
L. Erickson.....	17.47
O. A. Olson.....	43.17
Total.....	406.97

That the allegations of the plaintiff's complaint herein as found in subdivisions 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49 in regard thereto are true.

26.

That at the time of the making of the arrangement between the Jennes and the defendant bank, through its officers and directors, and in the fall of 1902, it was known and understood that the business theretofore carried on by the Jenne Creamery Company could not be continued without some arrangement being made for the payment of the outstanding checks, and without funds being advanced for the carrying on of the business, and it could not make such arrangement because of its condition, except with some interested party who might be willing to furnish funds to continue it in the hope of making more salvage out of the business.

27.

After the defendant bank took over the control and management of the Jenne Creamery Company, through its officers and directors, it paid the then outstanding checks of the Jenne Creamery Company as they were presented and advanced moneys to carry on the business. This taking over of the Jenne Creamery Company's business occurred about the last of September or the first of October, 1902. Up to December 30, 1902, the defendant bank had advanced \$8,200.00, being \$3,000.00 October 7th, \$1,000.00 November 28th and 303 \$4,200.00 December 16th; which advances were in form represented by notes of the Jenne Creamery Company, and the bank had also advanced on account an additional sum of \$81.12. All of this money and as well all money received from the sale of butter up to December 30, 1902, had been used in paying, the checks which were outstanding when the bank, through its officers, took over the Creamery Company's business, and the running expenses of the business to December 30, 1902, and the payment of the patrons' moneys to them except that the distribution of the proceeds of the sale of December butter 1902 was not then made.

28.

After the change in the management of the Jenne Creamery Company's affairs, no account of the moneys of the Creamery Company

were kept by the Creamery Company, as distinguished from the bank, but all the account that there was in reference to the moneys coming in or going out was kept by the bank, through a bank account, kept in the form of an account with the Jenne Creamery Company. On this account were credited up, in form to the Jenne Creamery Company, the checks received by the defendant bank for the butter sold, and also when the account was over-drawn sums of money for which the bank, in form, took the Creamery Company notes, and which sums represented the amounts the bank found it necessary to advance from time to time to pay the expenses of the Jenne Creamery Company, and prevent the account as kept from showing large overdrafts. The crediting, in form, to the account of the receipt of each month's proceeds of butter before the checks and drafts representing the same were actually collected, and before the distribution thereof was made to the rightful owners also tended to conceal the actual overdraft, and the bank, and its officers, also depended upon the slow presentation of checks by the patrons to further reduce the apparent overdraft, or amount, which the defendant bank would have to advance to carry on the Creamery Company business.

29.

At the time of the bank's failure, it had advanced \$8,000.00 toward the running of the Creamery Company business, for which
 304 amount it had, in form, taken the notes of the Creamery Company, and it had in addition paid out \$4,110.14 for the conducting of the Jenne Creamery Company business, which amount is shown by the bank account, and was the payment of the checks drawn in form in the name of the Jenne Creamery Company by the officers and directors of the bank, while conducting its business. In addition, there was due to the October and November patrons \$2,597.98, and there were outstanding checks in form issued by the Jenne Creamery Company to the April, June, July, August and September patrons aggregating \$406.97. The defendant bank attempted to, and in form did, credit up certain of the checks and drafts received as part of the proceeds of the October and November shipments of butter, said credits aggregating \$3,197.10, and including the check or draft for \$102.00 which was received November 17th and passed into the hands of the defendant receiver. By such book entries the bank account, in addition to the amounts advanced by the bank represented by notes, showed at the failure of the bank an overdraft of \$825.98.

Such book entries did not affect the actual status of the transaction nor give the defendant bank any right or claim to the proceeds of the October and November butter, nor in any wise affect the right of the October and November patrons to have and receive the same and such book entries were made before the checks or drafts representing the proceeds of the butter shipments were collected or received by the defendant bank or by its correspondent banks.

30.

That after the making of the arrangement with the bank through its officers and directors in the fall of 1902, the business was in form

conducted and continued under the name of the Jenne Creamery Company by the bank, through its officers and directors, and the Jenne Creamery Company as so run and conducted was insolvent and known so to be by the bank, its officers and directors, and that it was run and conducted by the bank, through its said officers and directors, in the interests of said bank, and for the purpose of making as much saving or salvage out of it for the bank as could be done.

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31.

That the fact that the officers and directors of said bank, who were held out as owning the stock thereof and as interested therein, had no interest whatever therein, and were only acting because of their relations with the bank, was not communicated by the bank, or its said officers or directors, to the patrons of said Jenne Creamery Company, nor was it made public.

32.

That the foreman employed by the officers and directors of the bank, who took over the stock and management of the Jenne Creamery Company for the bank, informed certain of the patrons that the officers and directors of the bank were individually interested in the Jenne Creamery Company, and that it was in better condition than ever before, and that such was generally believed by the patrons to be a true statement of the condition of affairs until after the failure of the defendant bank.

33.

That the bank, through its said officers and directors, continued to run and conduct and manage the business under the name of the Jenne Creamery Company, until the failure of the defendant bank, when the Jenne Creamery Company ceased to do business.

34.

That the defendant bank, and its officers and directors, at all times had full knowledge and notice of the interest and rights of the patrons in and to the funds received from the sale of butter made from the milk furnished by them, and knew that the said patrons were the owners of and entitled to said proceeds.

35.

That the diversion by the defendant bank of the funds, belonging to those patrons who delivered milk during the months of April, June, July, August and September, 1904, to the amounts as found in finding No. 25, was with full knowledge of their rights and ownership of said funds and was a breach of trust and that the defendant bank participated therein, and knew thereof and is liable therefore to the amount thereof.

306

36.

That on the 17th day of November, 1904, the defendant bank being insolvent was duly closed by the proper officers of the United

States and ceased to do business as a bank, and that thereafter the defendant, P. R. Earling, was duly appointed receiver of said bank by the proper United States authorities, and duly qualified and is now acting as such receiver.

37.

That all the claims and demands and rights of action of each and all of the patrons hereinbefore named and described, and as herein found, against the defendants herein, or any of them, were for value duly assigned and transferred to the plaintiffs herein prior to the commencement of this action, and they are now the owners and holders thereof.

38.

That prior to the commencement of this action the plaintiffs duly presented their said claims to the defendant, P. R. Earling as receiver of the Berlin National Bank, and duly demanded the return of the funds belonging to them, and offered to make proof thereof. That said defendant receiver refused to pay them any sum or sums whatever and rejected their claims, and refused to admit any liability whatever, and denied the rights and claims of said plaintiffs.

Conclusions of Law.

I.

That the plaintiffs are the equitable and beneficial owners of the proceeds of the funds received by the defendant bank and the defendant receiver from the sale of the butter made from the milk furnished by the plaintiffs assignors in the month of October and the first half of the month of November, 1904, to the amount of \$2,520.46.

II.

That said proceeds of the funds received from the sale of said butter to said amount have been traced and identified and are now in the hands of the defendant, P. R. Earling, as receiver of the Berlin National Bank, and he holds the same as trustee for
307 the sole benefit and use of the plaintiffs herein who are the true and rightful owners thereof and entitled thereto.

III.

That the plaintiffs are entitled to have and recover of and from the defendant P. R. Earling, as receiver of the Berlin National Bank, the said sum of \$2,520.46 in full out of the funds which have come into his hands as receiver, and with priority over all unsecured creditors of the Berlin National Bank.

IV.

That the plaintiffs as assignee of the patrons specified in finding of fact No. 25 are entitled to have and recover of and from the
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defendant, the Berlin National Bank and the Jenne Creamery Company, the said patrons' share of the proceeds of the sale of butter for the months of April, June, July, August and September, 1904, amounting in the aggregate to the sum of \$406.97.

V.

And said assignees are entitled to have their claim against the Berlin National Bank for the said sum of \$406.97 proved and adjudicated as against the defendant receiver at said sum of \$406.97, and to be recognized on said claim to said amount as a general creditor of the Berlin National Bank, and are entitled to participate pro-rata with the other general creditors of said Berlin National Bank in the distribution of its assets, and on the amount of any dividends heretofore declared they are entitled to receive a dividend pro-rata with the other general creditors, with interest on the amount of their pro-rata share of such prior dividend from the date the same was payable to the other general creditors to the date of the payment thereof to the plaintiffs.

VI.

The plaintiffs are also entitled to have and recover their taxable costs and disbursements in this action, to be paid by the defendant P. R. Earling, as receiver of the Berlin National Bank, out of the funds coming into his hands as such receiver, and payable as a part of the expenses of his administration of the estate.

308 & 309

VII.

Plaintiffs are entitled to have the order and judgment of this court herein in their favor and against the defendants herein in accordance with the usual form in such cases, and requiring said defendant receiver, if he do not comply therewith within thirty days, to certify the same to the Comptroller of the Currency.

Dated, this 11th day of November, A. D. 1905.

By the Court,

CHESTER A. FOWLER,
Circuit Judge.

* * * * *

310 Defendant duly requested in writing the said Court to find the following finding of fact, which request the court refused and defendant duly excepted to such refusal of said court to make the said findings as requested by defendant, which request and exception by defendant is as follows:

311

In Circuit Court, Green Lake County.

JOHN EMIGH and Others, Plaintiffs,

vs.

THE BERLIN NATIONAL BANK, P. R. EARLING, and Others,
Defendants.

The defendants ask the Court to find the following finding of fact in said action.

1st. That before the time of the commencement of this action, and, before the time of making any demand upon the said Receiver, P. R. Earling, defendant, by the plaintiffs, the said P. R. Earling, as such Receiver, had paid over and turned over to the Treasury Department of the United States, all moneys, securities and credits and effects by him received and taken into his hands as such Receiver and that the same were so turned over by the said Receiver, P. R. Earling, pursuant to the laws of the United States and pursuant to the carrying out of his duties as such Receiver.

PERRY NISKERN,

Def't's Att'y.

Refused.

C. A. F.

Defendants except Dec. 2d, 1905.

PERRY NISKERN,

Def't's Att'y.

* * * * *

312

Defendants duly made and filed their exceptions to the findings of fact and conclusions of law as made and filed by said court said exceptions of said defendants being as follows:

313

In Circuit Court, Green Lake County.

JOHN EMIGH et al., Plaintiffs,

vs.

P. R. EARLING, Receiver, and Others, Defendants.

Now come the defendants, P. R. Earling and The Berlin National Bank, and make and file the following exceptions to the Findings of Fact and Conclusions of Law made by said Court in the above entitled action.

1st. Defendants except to the 6th Finding of Fact as contrary to the evidence and not sustained thereby.

* * * * *

314

And defendants except to the Conclusions of Law by said court, as follows:

1st. Defendants except to the Conclusion of Law No. 1 as contrary to law and not sustained by the Findings of Fact nor by the evidence.

2nd. Defendants except to the Conclusion of Law No. II as contrary to the evidence, not sustained by the Findings of Fact.

3rd. Defendants except to the Conclusion of Law No. III as contrary to the evidence, not sustained by the Findings of Fact and contrary to law.

315 & 316 4th. Defendants except to the Conclusion of Law No. IV as contrary to the evidence, not sustained by the Finding of Fact and contrary to law.

5th. Defendants except to the Conclusion of Law No. V. as contrary to law, not supported by the Findings of Fact and contrary to the evidence.

6th. Defendants except to the Conclusion of Law No. VI as contrary to law, not supported by the evidence nor the Findings of fact, and, because the Court has no jurisdiction to direct the disbursements of funds in the hands of said Earling, as Receiver.

Defendants further except because the said Court refused to find as one of the Findings of fact the following;—which was requested by the defendants to-wit: "That before the time of the commencement of this action and before the time of making any demand upon the said Receiver, P. R. Earling, defendant, by the plaintiffs, the said P. R. Earling, as such Receiver, had paid over and turned over to the Treasury Department of the United States all moneys, securities and credits and effects by him received and taken into his hands as such Receiver and that the same were so turned over by the said Receiver, P. R. Earling, pursuant to the Laws of the United States and pursuant to the carrying out of his duties as such Receiver;" which request was made to said Court before the Findings signed were made and filed, and which request was refused by said Court on the 2nd day of December, 1905.

PERRY NISKERN,
Deft's Att'y.

* * * * *

317 & 318 Thereafter said defendants moved the Court for leave to file additional exceptions to the said findings of fact and conclusions of law which motion was as follows:

* * * * *

319 & 320 In the Circuit Court of Green Lake County, State of Wisconsin.

JOHN EMIGH et al., Plaintiffs,
vs.

P. R. EARLING, Receiver of the Berlin National Bank, and the
BERLIN NATIONAL BANK et al., Defendants.

Additional Exceptions by the Defendants.

Now come the defendants P. R. Earling, Receiver of the Berlin National Bank and the Berlin National Bank and make and file the following additional exceptions to the findings of fact and conclusions of law made by said court in the above entitled action:

a. The rulings and findings of facts and law and the judgment and decree of the Circuit Court violate the National Bank Act and the amendments thereto, Revised Statutes of the United States, sections 5133 to 5242 inclusive.

b. The rulings and findings of facts and law and the judgment and decree of the Circuit Court violate sections 5133, 5134 and 5136 of the Revised Statutes of the United States.

c. The rulings and findings of facts and law and the judgment and decree of the Circuit Court violate sections 5145 and 5190 of the Revised Statutes of the United States.

d. The rulings and findings of facts and law and the judgment and decree of the Circuit Court violate sections 5236 and 5242 of the Revised Statutes of the United States.

PERRY NISKERN,
RUFUS S. SIMMONS,
Attorneys for Defendants.

None of the points raised by the above proposed exceptions were suggested or presented to the court upon the trial of the case or upon the argument or in the briefs of counsel. Nor were any statutes of the United States cited or called to the attention of the Court. The general suggestion was made that the Bank was a National Bank and that the funds in question had been forwarded to the Treasurer of the United States in accordance with the law prior to the commencement of this suit.

With this explanation the above exceptions are allowed.

Signed June 5th, 1906.

CHESTER A. FOWLER,
Circuit Judge.

* * * * *

321 Thereafter said court made an order granting said motion of said defendants for leave to said defendants to file said additional exceptions which order is as follows:

322 In Circuit Court, Green Lake County, Wisconsin.

JOHN EMIGH et al., Plaintiffs,

vs.

P. R. EARLING, Receiver of the Berlin National Bank, and THE
BERLIN NATIONAL BANK et al., Defendants.

The said P. R. Earling said Receiver and said Berlin National Bank defendants above named having moved the Court for leave to file additional exceptions to the findings of fact and conclusions of law heretofore made in this action, and said additional exceptions so proposed by defendants being annexed to said motion, and the Court having taken said matter under advisement, the same having been duly argued by the respective parties.

The Court now makes the following statement and explanation:

None of the points raised by the proposed exceptions were sug-

gested or presented to the Court upon the trial of the case or upon the argument or in the briefs of counsel. Nor were any statutes of the United States cited or called to the attention of the Court. The general suggestion was made that the Bank was a National Bank and that the funds in question had been forwarded to the Treasurer of the United States in accordance with the law prior to the commencement of this suit. With this explanation it is

Ordered, That the said additional exceptions asked for by defendants be and the same are hereby allowed and the motion of said defendants for leave to file such additional exceptions as contained in their notice of motion herein is granted and the said additional exceptions to form part of the bill of exceptions herein the same as if filed at the time of the filing of former exceptions filed by defendants.

Dated June 19, 1906.

CHESTER A. FOWLER,
Circuit Judge.

323 On the 18th day of December, 1905, plaintiffs served notice of entry of judgment in this action, and thereafter on motion of defendants the costs in said action were re-taxed by the said Court on the 20th day of January, 1906.

STATE OF WISCONSIN,
Green Lake County, ss:

Whereas, heretofore, the defendants in the above entitled action duly served their proposed bill of exceptions herein.

And Whereas it has been stipulated that the foregoing may be signed as the Bill of Exceptions.

Now therefore and because none of the evidence, stipulations, objections, rulings, proceedings, decisions, orders and exceptions are of record in the above entitled action, I, Chester A. Fowler, the Circuit judge of said Court before whom the foregoing entitled action was tried do now settle this and the foregoing as the bill of exceptions in said action hereinbefore entitled and I do hereby certify that the same contains and is all of the evidence received and had upon the trial of said action and contains and is all of the evidence, stipulations objections, rulings, decisions, proceedings, motions offers, orders, exceptions and proceedings in said action, not otherwise of record herein.

Dated this 11th day of September, 1906.

CHESTER A. FOWLER, [SEAL.]
Circuit Judge.

* * * * *

324 & 325 Stipulated that foregoing may be signed as bill of exceptions in said cause.

Sept. 3d, 1906.

THOMPSON, THOMPSON &
PINKERTON, *Pl'ffs' Att'ys.*
PERRY NISKERN, *Def't's Att'y.*

* * * * *

326 & 327 (Endorsement:) Filed November 27, 1906, Clarence Kellogg, Clerk of Supreme Court, Wis.

* * * * *

328 And afterwards, to-wit: on the thirty-first day of January, A. D. 1908, the same being the twelfth day of the January term of said year, the following proceedings were had in this court, in said cause, that is to say:

Green Lake Circuit Court.

JOHN EMIGH et al., Respondents,

vs.

P. R. EARLING, as Receiver, &c., et al., Appellants.

And now at this day came the parties herein by their attorneys, and this cause having been argued by Rufus S. Simmons, Esq., for the said appellant, and by Messrs. E. F. Kileen and J. C. Thompson for the said respondents, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

329 And afterwards, to-wit: on the eighteenth day of February, A. D. 1908, the same being the seventeenth day of said term, judgment was rendered in said cause, by this court, in the words and figures following, that is to say:

Green Lake Circuit Court.

JOHN EMIGH and O. L. ATKINS, Respondents,

vs.

P. R. EARLING, as Receiver of the Berlin National Bank, and the BERLIN NATIONAL BANK, Appellants.

Opinion by Justice Dodge.

This cause came on to be heard on appeal from the judgment of the circuit court of Green Lake county, and was argued by counsel. On consideration whereof: it is now here ordered and adjudged by this court, that the judgment of the circuit court of Green Lake county, in this cause, be and the same is hereby affirmed, with costs against the said appellants taxed at the sum of seventy-seven and 85/100 dollars (\$77.85).

330 And thereupon this court, by Justice Dodge, filed its opinion in said cause, in the words and figures following, that is to say:

331 STATE OF WISCONSIN:

In Supreme Court.

No. 228.

JOHN EMIGH et al., Respondents,

vs.

P. R. EARLING, Receiver, et al., Appellants.

For several years prior to 1902 D. J. Jenne and E. H. Jenne were engaged in the creamery business with headquarters at Berlin, Wisconsin, but running several branch creameries and skimming stations in that vicinity. Since about March, 1902, the business had been in form conducted by a corporation known as the Jenne Creamery Company, of which the stock was all controlled and the offices all held by the Jennes. The business was conducted upon an arrangement with the farmers who supplied the milk, known as "the patrons," that the Jennes were to take the milk, manufacture therefrom the butter, sell the same and divide the proceeds, $3\frac{1}{2}$ cents to the Jennes for their services and the balance of the sale price to the patrons. Their method of making division was to deposit to their own account in Berlin Bank all sums which were usually received in bank checks or drafts from the purchasers and at the end of the month to draw their individual checks to the several patrons

332 for the amount to which they were found to be entitled upon a computation of the amount of cream or milk supplied by each. In October, 1902, the Jennes were much embarrassed. They owed the bank individually and as a firm the sum of some \$7,200. One of them owed about \$2,600 individually to others, and the Jenne Company had an unascertained present overdraft at the bank and had outstanding an estimated amount of \$5,000 (subsequently ascertained to be \$8,000) of its checks to patrons not yet presented. D. J. Jenne had a mortgaged farm and some other property and the Jenne Company in form owned the creamery and machinery and leases of several tributary stations estimated that time to be worth \$7,000 or \$8,000. In this situation D. J. Jenne came to the bank and had a consultation with the cashier, Mr. Brown, in which he laid before him his condition, stated his belief that with the volume of milk contributed by the patrons, the $3\frac{1}{2}$ cents a pound for butter which they were entitled to would gradually tend to pay off that indebtedness, but that interruption of the business by creditors would result in bankruptcy with probably much loss to the bank. He proposed to turn over all property in order that it might be realized to the best advantage towards the payment of debts. Several others of the bank officers were called in to the consultation, and at last it was agreed to adopt this general plan in order, as they said, to get as much salvage as possible for the bank. Accordingly the bank's attorney drew a written agreement whereby all the property of the Jennes was conveyed to the Cashier, Brown, in trust, to realize the

333 same in his discretion by sale or use and apply the proceeds to all debts of D. J. and E. H. Jenne. The conveyance included the entire capital stock of the Jenne Creamery Company, and he was authorized, at his option, either to close up that company or continue its operation, or form a new corporation, and ultimately, after all debts were paid, to return any remainder of the property to the Jennes. Upon the transfer of such property, including the stock in the corporation, the latter was equipped with new officers, consisting of the president and vice-president of the bank and Brown, the cashier, who supervised the running of the business of the creamery company, except the manufacturing and selling, which was conducted by employees. The farm of D. J. Jenne was sold so as to yield \$4,000 above its mortgage, and with this his personal debts, other than to the bank, were paid and a surplus of some \$1,400 applied to his debt to the bank. The milk of the various patrons was received in the name of the Jenne Co., manufactured into butter, sold, and the gross proceeds deposited in the bank by Brown in an account in the name of the Jenne Creamery Company and checks were drawn against that account both for the share to which the patrons were entitled and for the other expenses of the creamery business and the outstanding checks of the company which had been given prior to the transfer of the stock were paid as presented and charged up against this account. The business does not seem to have resulted profitably, for from time to time, as the amounts paid out exceeded those received, a note would be

334 made by Brown in the name of the Jenne Creamery Company and placed to the credit of said bank account. This course of business continued up to November, 1904, when the bank was closed by the comptroller of the currency and later placed in the hands of defendant Earling, as receiver. At that time the account of the creamery company was exhausted or overdrawn, that is to say all moneys that had been theretofore received from the sale of butter had been paid out to some one, mainly of course upon checks to the patrons. There were \$406.97 of such checks, issued prior to October 1, 1904, which had not been presented and paid. There had been no checks issued to patrons for the proceeds of butter made from the milk brought in by them during the month of October and that part of November prior to the suspension of the bank. It was shown and found by the court that bank drafts had been received into the bank for such butter. Such drafts ran to the Jenne Creamery Company and were endorsed by Brown the cashier and mingled with other moneys of the bank. The total amount was \$2,520.46. It was found by the court upon careful analysis of the accounts that at all times after the receipt of any of said drafts the bank had on hand an amount of money and cash items exceeding said total and such an amount was turned over to the receiver upon his taking possession. It also traced a considerable share of said drafts into the hands of the bank's correspondents at other cities by which they had been collected and credited to the bank, and in each case it was found that there remained a credit account with that correspondent larger than

the amount of such drafts sent to and collected by it, which
335 credit balance was turned over to the receiver after his appointment. It appeared that upon the closing of the bank Brown desisted from all connection with this creamery business and a small amount of drafts that afterwards came in for cream passed directly into the possession of the receiver. The court found as a fact that the arrangement whereby the Jennes turned over their property, including the control of the creamery business, was had by them with the bank as such; that the use of Brown's name was only formal and that the continuance in form of the corporation was only for convenience of bookkeeping and dealing with the patrons, so that the bank received directly to its own use all of the proceeds of the butter sold; that by the terms of the agreement with the patrons the share of those proceeds apportionable to them was at all times their property, and that the Jenne Company, while in operation, and the bank in continuing its business, was a mere trustee and received the proceeds of the butter for and as the property of the respective patrons, and hence that, when it paid out that money to others than the owners of it, it at least remained indebted to such owners, and on that theory declared the holders of the \$400 of checks for moneys collected prior to October were general creditors of the bank and entitled to the dividends like any other creditors. As to the moneys which had come into the bank for cream sold in October and November, it was held that they had not been paid out but were in the bank at the time of its suspension, and were turned over to the receiver and were charged with their trust character in his hands, and
336 accordingly adjudged liability against him for the whole amount thereof to the plaintiffs, to whom all of the patrons had assigned their claims. From such judgment both defendants appeal.

337 DODGE, J.:

The first and probably the most earnestly contested question of fact was whether the transaction between the Jennes in October, 1902, constituted a turning over of the former's property to Brown as an individual or, instead, to the bank, for its corporate purposes, with Brown serving merely as nominal custodian of title for it; and as a result whether the bank collected the proceeds of the sales of butter or the same were collected by Brown as an independent individual and were received by the bank from him as his money and not the bank's. The trial court, after hearing all the evidence, seeing all the parties and evidently considering all the circumstances and conduct, has reached the conclusion that the transaction was with the bank and that what Brown did the bank did and where Brown's name was used such use was nominal only; and has especially found that it was the bank through its officers and directors who took the milk furnished by the patrons, made the same into butter and sold it and collected the proceeds. After a careful review of that evidence we cannot say that it preponderates against this finding in any such manner or degree as could warrant us in reversing the same, even in view of the vigorously urged improbability that a

national bank would so far depart from its legitimate business as to engage in the manufacture and sale of butter. We therefore assume such finding of fact as a starting point for considering the rights of the parties.

The agreement under which the patrons delivered their milk is generally set forth in the statement of facts. We have no doubt that under the authority of *Boyle vs. Northwestern Nat. Bank of Superior*, 125 Wis. 498, the proceeds of the butter, after deducting the fixed commission or toll allowed the Jenne Creamery Company by the patrons, remained their property and not merely a debt from the person collecting the same, and that the bank, having received the money under and by virtue of these contracts, assumed the place formerly occupied by the Jenne Company and, when it collected the proceeds, held the same as the property of the owners of the several patrons until it was in fact paid over to them.

It being established that this butter money belonged to the patrons and was received by the bank for them and under a duty to pay it to them, it follows that when the bank applied such money to another purpose, and failed on demand to pay it over, it at least became indebted therefor to the owners. Whether it might also have been guilty of an unlawful conversion need not here be considered, as no judgment has been rendered based upon such view. Now in the several months prior to October it had done just this thing with the moneys of certain of the patrons. True it had issued its checks to those patrons, for under the findings of the court the checks drawn in the name of the Jenne Creamery Company by Brown against the moneys which the bank had received must be deemed in all legal effects the same as if drawn by the bank upon itself. But these checks constituted no payment but merely an evidence of the

amount of money which the bank held belonging to each of these patrons. When upon the closing of the bank, payment of these amounts was refused and it was made apparent that prior to that time the bank had used the money for other purposes, either to pay expenses of the creamery business or to apply upon the indebtedness to it of the creamery company, or otherwise, the inevitable result was that the bank was at least a debtor of the owners of the money as much as any other of its creditors. Hence we cannot doubt the correctness of the court's conclusion with reference to the \$406.97 which was in this situation. The owners had a right to stand as general creditors of the bank and to share in any dividends that might be declared out of its assets, which had been enhanced by the receipt and appropriation to the bank's uses of their proper moneys.

The question with reference to the moneys which were shown to have been received by the bank during October and November, and which the receiver was required to pay to the owners in full, involved very different consideration. Of course the receiver could be under no duty to pay to them unless he received their moneys while capable of identification as such. What was not identifiable as belonging specifically to anybody else came to his hands as assets of the bank

and, under the National Banking Act, must be ratably apportioned amongst all its creditors. R. S. U. S. Section- 5236, 5242; Davis v. Elmira Savings Bank, 161 U. S., 275. It is a principle generally established and fully adopted in this state, as appears by
340 Bromley v. Cleveland &c. Ry. Co., 103 Wis., 562, and Boyle v. Bank, Supra, that when moneys belonging to other persons are received and mingled in a general fund with moneys belonging to the depositary and then such depositary or trustee pays out generally from such fund for his own purposes there is a presumption of law, that such payments are made from the moneys in said fund belonging to him, and do not constitute wrongful misappropriations of the moneys of the *Cestui qui trust* which he has no right to pay out in that way but that they remain on deposit. Of course this presumption is possible of complete effect only so long as the fund is large enough to contain all the moneys of the *cestui qui trust* and some of the moneys of the trustee. But in this case the court has carefully analyzed the condition of the bank's funds through the entire months of October and November and has found that at no time after any of the proceeds of October butter came to the bank has its money on hand been drawn down to a sum less than the amounts so received, from which must result the presumption that the balance which it at all times had on hand including the very moneys so collected and belonging to these patrons and that their moneys, therefore identifiable were in the possession of the bank at the time of its closing and passed into the physical possession of the receiver. Lest this presumption should be thought to be overcome by proof that the proceeds of any individual draft for butter did not go into the fund of money in the bank's vaults or custody, but was
341 otherwise specifically disposed of, the court below also traced each specific draft and in great detail ascertained that where they had been sent to one or another of the bank's correspondents for collection they had been collected and had been placed to the credit of the bank in its account with said correspondents, where of course it remained charged with the same trust as against the defendant bank as it in its physical possession. Boyle v. Bank, supra. The Court then proceeded to ascertain in the case of each of the bank's correspondents who had received any one or several of such drafts and had collected them, that that particular account had never been drawn down so low as to be less than the total of the amount of the patrons' money which was included therein; and hence results the conclusion that in each of those accounts was the entire amount of such patrons' money at the time when the bank closed. It was of course shown that the balances of all such accounts passed through the receiver and had either been collected by him, and still remained under his control. Upon this showing, under the authorities already cited, there results inevitably the court's conclusion of law that the receiver had received in actual money, or in credits with correspondents the \$2520.46 belonging to the patrons. If he received the same of course he could hold it only as trustee for the owners. He did not receive it as moneys of the bank upon any trust to distribute to the creditors of the bank, for he could receive

only the bank's property in that capacity and upon that trust. He is now and has been at all times chargeable with the duty of paying it but to the true owners.

The conclusions of the trial court are attempted to be averted by most vigorous contention that it is wholly beyond the power
342 of a National Bank to engage in creamery business and much citation is made of federal authority to that effect. The exact limits of the power of a bank, which, being a creditor, becomes possessed of property or property rights in various forms as security, to do acts in management or improvement of such property or development of such rights, in order to render them valuable, to the end, in good faith, of thereby securing liquidation of the debts to it, is quite indefinite, and, doubtless, public policy requires that a bank, like an individual, should have broad powers of the exercise of discretion and judgment, to the end that property or rights so held as security be rendered as valuable as possible, so that it may not lose that which it ought to collect. *Security Nat. Bank v. St. Croix Power Company*, 170 Wis. 211. But we need not try to resolve this somewhat uncertain and vexed question. No authority has been cited, and we think none can be, to deny the power of a banking corporation or any other corporation to disgorge property of another which it had got into its possession by any means whatever under a duty to disgorge. It may have had no legal power to take the steps by which the money of these plaintiffs' assignors came to its hands; but having taken such steps and obtained their money no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity.
Beloit v. Heineman, 128 Wis. 398, 401.

343 There are other grounds urged by the respondents, and indeed based upon the facts found by the court, upon which it is claimed that the judgment would be justified even were it not held that the bank was the real holder and custodian of the property turned over by the Jennes and of the right to collect the money of the patrons. Such grounds involve generally the doctrine of the chargeability of a depositary with responsibility to the true owner of funds if it receives them with notice of such rights. We need not discuss how effective such principle might be under other circumstances, having concluded that we must sustain the finding of the court to the effect that the bank was the actual party conducting this business and receiving these moneys. Upon that basis we are satisfied that the judgment of the court below was correct.

By the Court.

Judgment affirmed.

344

Supreme Court of Wisconsin.

JOHN EMIGH and O. L. ATKINS, Plaintiffs and Respondents,
vs.

P. R. EARLING, Receiver of the Berlin National Bank, and THE BERLIN NATIONAL BANK, Defendants and Appellants.

Certificate of Questions Raised by Appellants.

Upon application of appellants, the Court doth hereby certify, and doth hereby order, that this certificate be spread upon the record; that in its brief and upon the oral argument of this cause in this court the appellant- raised and urged the following objections to the judgment and decree of the Circuit Court of Green Lake County, Wisconsin, in the manner and form, to wit:

Errors Relied Upon.

The Circuit Court erred in its findings and conclusions of law and judgment as follows:

1. The rulings and findings of fact and conclusions of law and the judgment and decree of the Circuit Court of Green Lake county, Wisconsin, holding that the Berlin National Bank, by itself, or by any of its officers, board of directors, or agents, was conducting or operating the Jenne Creamery Company and carrying on the business in which that company was engaged, of separating butter-fat from milk, manufacturing the same into butter, marketing the product and accounting for the proceeds to the patrons who furnished the milk, and ordering P. R. Earling, receiver of the Berlin National Bank, to pay claims of such patrons, creditors of the Jenne Creamery Company, out of the funds in his hands as receiver of the bank, are against the validity of the statutes of and the authority exercised under the United States by, and the title, right, privilege and immunity of and the authority exercised by the receiver of

the Berlin National Bank under the United States and the
345 national bank act and the amendments thereto (Revised Statutes of the United States, sections 5133 to 5242 inclusive), in the following particulars, because:

a. Under section 5133 banks cannot be formed for any other object or carry on any other business than that of banking; and under section 5136, could not be organized or become a body corporate, or have power to make contracts, or by its board of directors or duly authorized officers or agents exercise any powers except such incidental powers as shall be necessary to carry on the business of banking; and the court decided in its findings of fact 7, 8, 10, 11, 12, 13, 24, 25, 26, 27, 28, 29, 30, 31, 33 and 34 and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the bank had notice of the arrangement between Brown and the Jenne Creamery Company, and that the same was actually made by the bank to carry on, and that the bank did in fact carry on, the

business of the Jenne Creamery Company, and that the bank officers, directors and agents could bind the bank in that matter.

b. Under section 5134, the bank must state in its organization certificate the place where its operations of discount or deposit are to be carried on, and particularly the county and state and town or village, and cannot carry on operations in any other place, and under section 5190 the established business of the bank is required to be transacted in an office or banking house, located in the place specified in its organization certificate; and the court decided in its findings of fact 12, 13, 30 and 33, and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the bank could carry on business in other places than in its banking house, located in the City of Berlin.

c. Under section 5137 the bank could hold real estate for no other purpose than that necessary for its immediate accommodation in the transaction of its business, or mortgaged by way of security for debts, previously contracted or conveyed in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales under judgments, decrees or mortgages held by the bank, or purchased to secure debts due to it; and the court decided in its findings of fact 7, 8, 10, 11, 12, 13, 24, 25, 26, 27, 28, 29, 30, 31, 33, and 34, and other findings of fact and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the bank did hold the real estate of the Jenne Creamery Company and the five leased creameries, none of which was acquired by the bank in the mode or for the purpose authorized by the bank act.

d. Under section 5154 the affairs of the bank are required to be managed by not less than five directors; and the court decided in its findings of fact 6, 8, 10, 11, 29, 30, 31, 32, 33 and 34, and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that the affairs of the bank could be managed by less than five directors.

346 & 347 e. Under section 5236 the comptroller of the currency is required to make a ratable dividend of the money paid over by the receiver of the bank on all established claims; and under section 5242 all transfers of deposits and of money for the use of its creditors after the commission of an act of insolvency with a view to prevent the application of the bank's assets in the manner prescribed by the bank act, or with a view to the preference of one creditor to another, shall be utterly null and void; and the court decided in its findings of fact 12, 13, 14, 24, 25, 29, 34 and 35, and other findings, and in its conclusions of law 1 to 7 inclusive, and in its judgment, that certain funds collected by the bank upon checks and drafts to the order of the Jenne Creamery Company in payment for sales of butter and deposited in the bank for collection are trust funds and should be paid in full as prior claims over all the general and unsecured creditors of the bank, and certain others should be entitled to participate in dividends, and that the costs should be paid out of the funds of the bank.

2. In the finding that the bank had notice or knowledge of the acts of Brown, Steadman and Foster in operating the Jenne Creamery

Company and of the rights of the plaintiffs and their assignors (findings, 6, 11, 24, 26, 28, 29, 30, 31, 33, 34, 35).

3. In the findings that the agreement of October, 1902, between the Jennes individually and the Jenne Creamery Company with Brown was in effect an agreement with the bank and that the acts of Brown thereunder were the acts of the bank (findings 6, 7, 8, 10, 11, 24, 27, 28, 29, 30, 31, 32, 33, 35).

4. In the finding that the several claims amounting to \$406.97 were valid claims against the Berlin National Bank (findings 24, 25).

5. In its findings 13, 14, 15 & 16 and its conclusions of law that the plaintiffs are the equitable and beneficial owners of the proceeds of sales of butter, amounting to \$2,520.46, and entitled to recover the same in full from the receiver (Conclusions of Law, 1, 2, 3 and 7).

6. In its findings 24 & 25 and its conclusion of law that the several claims, amounting to \$406.97, were valid claims against the bank and that the plaintiffs were entitled to receive dividends thereon from the receiver (Conclusions of Law 4, 5 and 7).

7. In its conclusion of law that the plaintiffs are entitled to recover their costs (Conclusion of Law 6).

In attestation whereof the Court has caused the same to be signed by the Chief Justice, and the seal of the court to be affixed at Madison this 13th day of March, in the year one thousand nine hundred and eight.

[Seal Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice Sup. Ct. Wis.

* * * * *

348 SUPREME COURT OF WISCONSIN:

JOHN EMIGH and O. L. ATKINS, Plaintiffs and Respondents,
vs.

P. R. EARLING, Receiver of the Berlin National Bank, and THE
BERLIN NATIONAL BANK, Defendants and Appellants.

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office in the above entitled cause.

That the petition for the writ of error with the allowance of the same endorsed thereon by the Chief Justice of this Court, the original writ of error issued by the Clerk of the Circuit Court of the United States and allowance endorsed thereon by the Chief Justice of this Court, the original citation with the admission of service endorsed thereon by counsel for defendants in error, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this 17th day of April, A. D. 1908.

[Seal of the Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

349 Supreme Court of the United States.

No. 741.

P. R. EARLING, Receiver of the Berlin National Bank, and THE
BERLIN NATIONAL BANK, Plaintiffs in Error,

vs.

JOHN EMIGH and O. L. ATKINS, Defendants in Error.

Assignments of Error.

The plaintiffs in error P. R. Earling, Receiver of the Berlin National Bank and the Berlin National Bank aver that there is error in the record and proceedings and decision and decree of the Supreme Court of the state of Wisconsin in this cause lately pending in that court wherein these plaintiffs in error were defendants and appellants and the defendants in error herein John Emigh and O. L. Atkins were plaintiffs and respondents; in the following particulars, to wit: that,

1. The decision holding that the Berlin National Bank, by itself, or by any of its officers, board of directors, or agents, was conducting the business of the Jenne Creamery Company, and ordering the receiver of the bank to pay out of the funds in his hands claims of patrons or creditors of the Jenne Creamery Company is against the validity of the national bank act, particularly of sections 5133 and 5136 of the Revised Statutes which prohibit a bank from doing other than a banking business.

350 2. The decision holding the bank was bound by the operation of the Jenne Creamery Company business is against the validity of the national bank act and particularly of sections 5134 and 5190 of the Revised Statutes which prohibit a bank from transacting the business of the bank in any other place than where its banking house is located and that specified in its organization certificate.

3. The decision holding that the bank conducted the business of the Jenne Creamery Company is against the validity of the national bank act and particularly of section 5154 of the Revised Statutes which requires the affairs of a bank to be managed by not less than five directors.

4. The decision distributing the assets of the bank to the creditors of the Jenne Creamery Company is against the validity of the national bank act and particularly of sections 5236 and 5242 of the Revised Statutes which require ratable dividends and prohibit all transfers with a view to preferences.

Wherefore the plaintiffs in error P. R. Earling, Receiver of the Berlin National Bank and the Berlin National Bank pray that the decision of the Supreme Court of the state of Wisconsin be re-examined and reversed.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Solicitors for Plaintiffs in Error.

351 [Endorsed:] No. 741. 21144. Supreme Court of the United States. P. R. Earling, Receiver of the Berlin National Bank and the Berlin National Bank, Plaintiffs in Error, vs. John Emigh and O. L. Atkins, Defendants in Error. Assignments of Error. (1.) Simmons, Mitchell & Irving, Solicitors for Plffs. in Error. 108 La Salle St., Chicago. Tel. Main 1488.

352 [Endorsed:] File No. 21,144. Supreme Court U. S. October Term, 1907. Term No. 741. P. R. Earling, Receiver, etc., et al., Plffs. in Error, vs. John Emigh et al. Assignment of Errors. Filed May 25th, 1908.

353 Supreme Court of the United States.

P. R. EARLING, Receiver of the Berlin National Bank, and THE
BERLIN NATIONAL BANK, Plaintiffs in Error,
vs.
JOHN EMIGH and O. L. ATKINS, Defendants in Error.

Stipulation as to Printing Transcript of Record.

It is hereby stipulated and agreed by and between counsel for plaintiffs in error and defendants in error that only certain portions of the transcript of the record shall be printed, and Mr. James H. McKenney, Clerk of this Court, is requested to omit from the printing of the same the following portions which it is agreed by and between counsel for the respective parties shall not be printed, to-wit:

1. Supersedeas bond, certificate and endorsements, p. 10-13.
2. Notice of appeal and undertaking on appeal, and endorsements thereon, from Circuit Court, Green Lake County, to Supreme Court of Wisconsin, p. 15-19.
3. Summons to defendants and return and endorsements thereon, p. 20-22.
4. After the first paragraph in part 5 of complaint, p. 27, omit all of the allegations down to the last paragraph on p. 41 except that there shall be printed in tabular form the name of the person, of the creamery, the pounds of milk, and the pounds of butter fat, as follows:

Name.	Creamery.	Pounds of milk.	Pounds of butter fat.
F. Georgeson	Terrill	3372	121.3

and in the same manner with the items in the various paragraphs.

354 5. After the first paragraph in part 6 of the complaint, p. 42, omit all the allegations down to the bottom of p. 54, except that there shall be printed in tabular form the name of the person, of the creamery, the pounds of milk, and the pounds of butter fat, as follows:

Name.	Creamery.	Pounds of milk.	Pounds of butter fat.
A. Wallers	Terrill	465	21.3

and in this manner with the items in the various paragraphs.

6. Omit all the allegations in part 32 of the complaint beginning on p. 62 to the end of part 49 of complaint on p. 82, except that there shall be printed the first sentence of each of said parts 32 to 49 inclusive of complaint and the words "That a check was issued therefor payable to said last named person," of the second sentence of each of said parts of the complaint.

7. Omit verifications to complaint and endorsements thereon, p. 88-89.

8. Omit the demurrer and the endorsements thereon of John W. Brown, p. 90-91.

9. Omit the title and verification and endorsements on the answer of P. R. Earling, Receiver, p. 92-93.

10. Omit the title and verification and endorsements on the answer of the Berlin National Bank, p. 94-95.

11. Omit the title and the endorsements on "Direction for Findings," p. 96-97.

12. Omit the title and the endorsements on the judgment, p. 98-101.

13. Omit notice and certified copy of judgment served on defendants and the ruling on taxation of costs, and all endorsements thereon, being all of ps. 102-108.

14. Omit "Exhibit 1," p. 161.

15. Omit "Exhibit 2," p. 162.

16. Omit "Exhibit 5," p. 165-166.

17. Omit "Exhibit 7," p. 172-173.

18. Omit "Exhibit 8," p. 174-175.

355 19. Omit "Exhibit 9," p. 176-177.

20. Omit the sales book of the Jenne Creamery Co., being "Exhibit 10," p. 178 to the bottom of p. 191.

21. In "Exhibit 12" to "Exhibit 17" inclusive, omit the second check beginning on p. 208 and all the following checks down to and including the check, "Exhibit 17," p. 212, except that of said checks there shall be printed a tabulated statement containing the name of the payee, amount, and date, as follows with respect to all the said checks:

Name.	Amount.	Date.
J. Carpenter	\$5.90	August 21st, 1904.

22. In "Exhibit 19," p. 214, after the third paragraph on said page which contains the names Mrs. Zietlow and N. Marks, omit the remainder of said exhibit and all of "Exhibits 20 to 29" inclusive down to p. 234, except that the last four lines in ink on said p. 234 shall be printed.

23. In "Exhibit 30," p. 236, omit all after the fifth line containing the name of A. Morson, and all of the matter appearing on p. 237-250 inclusive, except that on p. 237 the first three lines shall be printed; p. 238, first line; p. 239, 240, 241, 243, 244, 245, 246, 248, 249, and 250, the first two lines.

24. Omit "Exhibit 31," the milk book of the Jenne Creamery Company, p. 252-259 inclusive.

25. Omit p. 264-273 of the record inclusive. Omit p. 275-276 inclusive. Omit p. 278-280 inclusive. Omit p. 286-288 inclusive.

26. Omit the endorsements on pp. 309, 311, 316, 320, 325, 347.

27. Omit all exceptions to the findings of fact after the first exception on p. 313 down to and including the 26th exception on p. 314.

28. Omit the certificate of the Clerk of Green Lake County, Wisconsin, on p. 326.

29. Omit the notices on p. 318 and 324, (but not stipulation) and the recital and order of continuance on p. 327.

RUFUS S. SIMMONS,
Counsel for Plaintiffs in Error.
J. C. THOMPSON,
Counsel for Defendants in Error.

357 [Endorsed:] 741. 21144. Supreme Court of the United States. P. R. Earling, Receiver of the Berlin National Bank, and The Berlin National Bank, Plaintiffs in Error, vs. John Emigh and O. L. Atkins, Defendants in Error. Stipulation as to printing transcript of record. Original. (2.)

358 [Endorsed:] File No. 21,144. Supreme Court U. S. October Term, 1907. Term No. 741. P. R. Earling, Receiver, &c. et al., vs. John Emigh et al. Stipulation as to printing record. Filed May 25th, 1908.

Endorsed on cover: File No. 21,144. Wisconsin supreme court. Term No. 144. P. R. Earling, receiver of the Berlin National Bank, and The Berlin National Bank, plaintiffs in error, vs. John Emigh and O. L. Atkins. Filed April 28th, 1908. File No. 21,144.

Office Supreme Court, U. S.
FILED.

MAR 26 1910

JAMES H. McKENNEY,

CLERK.

SUPREME COURT OF THE UNITED STATES

No. 144.

OCTOBER TERM, 1909.

GEORGE C. RANKIN, Receiver of The Berlin National Bank
and THE BERLIN NATIONAL BANK,
Plaintiffs in Error,

vs.

JOHN EMIGH and O. L. ATKINS,
Defendants in Error.

No man is entitled to the aid of a Court of Equity,
when that aid becomes necessary by his own fault.

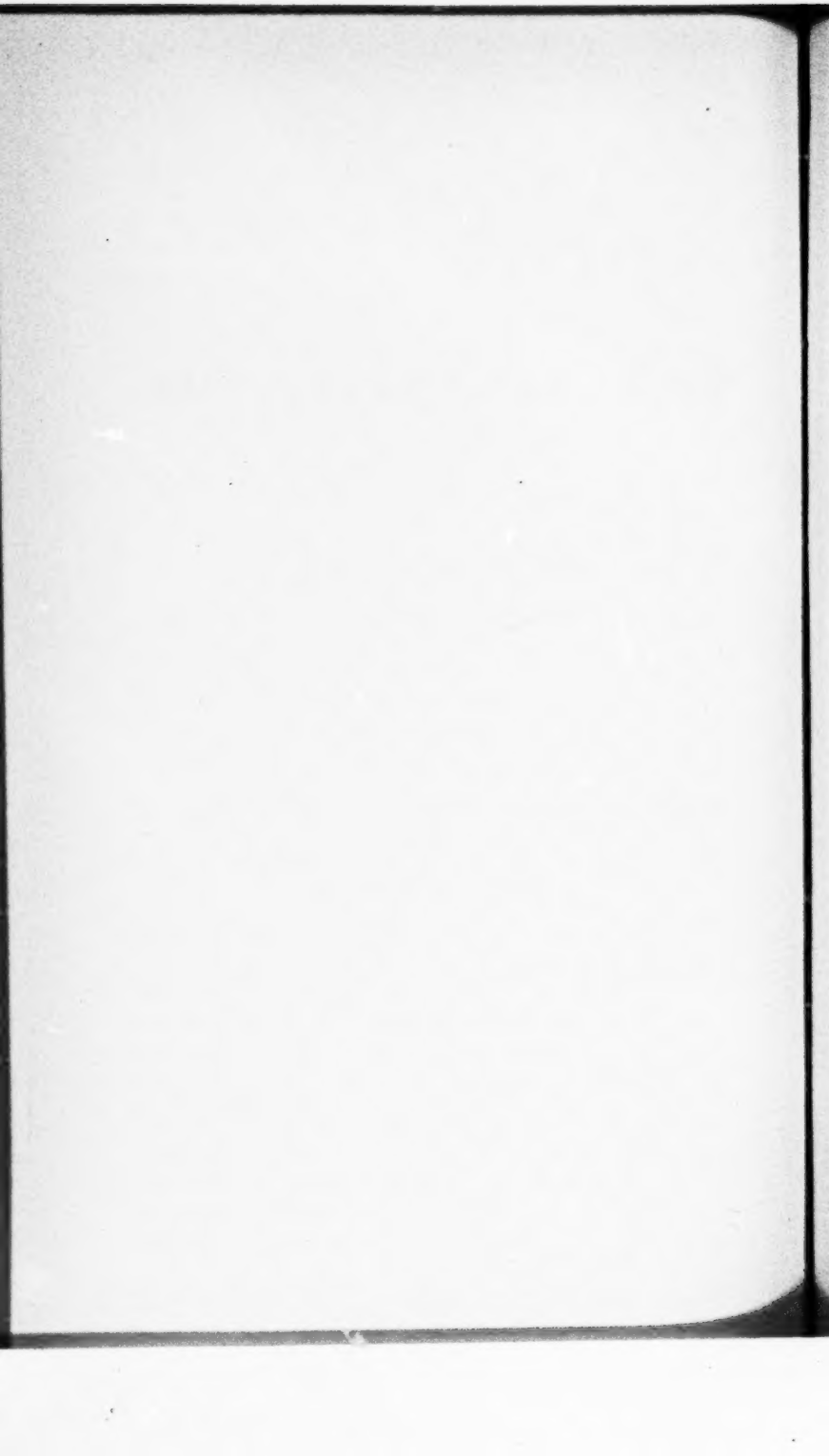
Lord Kames 2 Fonbl. Eq. 325.

BRIEF FOR PLAINTIFFS IN ERROR.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,

Counsel.

Geo. Hornstein Co., Printer, Chicago.



Supreme Court of the United States

No. 144.

OCTOBER TERM, 1909.

GEORGE C. RANKIN, Receiver of The Berlin National Bank
and THE BERLIN NATIONAL BANK,
Plaintiffs in Error,

vs.

JOHN EMIGH and O. L. ATKINS,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This writ of error to the Supreme Court of the State of Wisconsin (1-5) has been sued out by the Receiver of the Berlin National Bank and the bank itself to reverse the judgment of that court affirming a decree of the Circuit Court of Green Lake County, Wisconsin, holding that the national bank took charge of and operated the Jenne Creamery Company or butter factory for a period of two years before the bank failed. The finding proceeded upon the theory that the bank without making known it was running the business, received the milk of the

patrons of the butter factory and its eight out-lying milk stations, manufactured it into butter, which it sold, and collected the proceeds. The Court fastened a constructive trust upon those proceeds and directed that \$2520.46 of the milk patrons demands should be paid in full as preferred claims and \$406.97 thereof should receive the pro rata dividends with interest, which had theretofore been paid to the general creditors of the bank. (28-30)

FEDERAL QUESTION.

The federal question was called to the attention of the trial court, when the present counsel came into the case, in the form of additional exceptions to the findings of fact and conclusions of law, and to the decree. (132-133)

In the Supreme Court of the State this federal question, that a national bank had no power to operate a butter factory or incur liability therefor, was urged and relied upon and a certificate to that effect by the Chief Justice was spread upon the record. (142) These objections are now assigned as error (145-146), and in our brief, *infra*, the assignments are amplified in form.

The Supreme Court of Wisconsin in its opinion delivered by Mr. Justice Dodge referring to the contention that it is wholly beyond the power of a national bank to engage in creamery business, declared that the exact limits of the power of a bank to do what was said to have been done in the case at bar is quite indefinite and decided to "not try to resolve this somewhat uncertain and vexed question," and

ruled against it and denied the claim. (138-141). See the official report *Emigh and Another v. Earling Receiver*, 134 Wis. 565-575.

FORM OF ACTION.

The action is an equitable proceeding by the two plaintiffs Emigh and Atkins, assignees of about 287 milk producers, for an accounting of the proceeds of sales of butter made from milk furnished by these producers or patrons in the Counties of Green Lake, Marquette and Waushara, Wisconsin, to the Jenne Creamery Company a corporation located in the City of Berlin, and to eight creameries or milk stations leased by it. The milk patrons alleged the milk had not been sold and that they remained the beneficial owners thereof. The bill of complaint contains 59 paragraphs. (6-27) Paragraphs 1 to 7 and 28 to 31 (18-19), and 50-59 (23-27), contain the principal allegations.

LEADING FACTS.

The facts will appear more clearly if the evidence is read in chronological order; the depositions first (57-116) and then the oral testimony on the trial. (31-57) The trial court made 38 Findings of Fact (117-129) and VII Conclusions of Law. (129-130.)

The Berlin National Bank with a capital stock of \$50000 (58) did business as a national bank at Berlin, in Wisconsin, Findings 1 and 2 (117) until it became insolvent and was closed by the comptroller, November 17th, 1904, and a receiver appointed. Finding 36 (128.)

Brown the cashier, Foster the president and H. E. Stedman assistant cashier were also directors of the bank. Other directors were Bellis, Bunce, Koch and Middleton. (58.) As cashier Brown "had what ordinarily falls on the cashier to do with the management of it and no more." (58.)

The Jenne Creamery Company, after its organization as a corporation in March, 1902, continued to carry on the business formerly conducted by the partnership of D. J. Jenne & Co. in Berlin, Green Lake County. Findings 1 and 3 (117.) D. J. Jenne and E. H. Jenne, the members of that partnership, and the wife of one of them owned all the stock of the creamery corporation. (35.)

In October 1902 the creamery was on the verge of bankruptcy. At that time D. J. Jenne individually owed the bank \$2200. and other creditors \$2600. The firm of D. J. Jenne & Co. owed the bank \$5000. Whether the creamery was indebted to the bank at that time, and if so, in what amount, is not clear. The court found it "had an overdraft at the defendant bank". Finding 4 (118.) Brown the cashier, spoke of an overdraft in his deposition (58 77) and afterwards on the trial said he did not remember whether the creamery had an overdraft. (40.) There is no other evidence of the fact and the bank book (Exhibit 11) does not show there was an overdraft at that time. (97.) Finding 5 (118). The finding itself that the "bank was a creditor of the Jennes individually, and of the firm, and of the corporation, to the extent of \$7200." is not clear as to any debt of the corporation, after the preced-

ing statement that the other two persons named owed that exact amount to the bank. (58 77 and 40.)

There is a finding that the creamery had drawn and issued checks, which were then outstanding, against its account in the bank for about \$8000., but the checks had not at that time been presented to or accepted by the bank, Finding 4 (118 and 40 59.) and were not in fact presented or paid until later. (40) Finding 27 (126)

At this time, in October 1902, the evidence is that D. J. Jenne came with his brother-in-law and saw Brown the cashier, privately in a back room of the bank, stated their condition and said they wanted to place all of their property in Brown's hands for the purpose of paying off their debts; and Brown consented to do this. (35 58 59.) Brown called in as many of the directors as convenient to listen to the verbal statements of Mr. Jenne, but it was an informal and not a regular meeting of the board of directors. (59) The matter was never submitted to the directors, only talked over by Brown with Stedman and Foster, the two directors who held with him the Creamery stock. (40) Brown said in the same connection that the bank wanted to get as much salvage out of the property as possible. (40 78)

A few days afterwards a written agreement was executed between the Jennes and Brown; and Brown says that "no officer of the Berlin National Bank had as an officer of the bank anything to do with the execution or preparation of that agreement." (35)

This agreement or trust deed, Exhibit 6, (91-95)

was dated Oct. 1, 1902 and conveyed to Brown all the partnership property, and all the stock and leases and property of the Creamery Company for the purpose of paying the debts of the individuals, and the firm, and the corporation. No mention of the bank is made in the deed. Brown was given full power to operate the creamery and wind up its affairs. The trust deed was never recorded. D. J. Jenne also conveyed to Brown by warranty deed of even date, as part of the same transaction and for the same purposes, a farm which was afterwards sold for \$9000. (77)

In order to hold the corporation intact the larger part of the stock was assigned to Brown and, at his direction, part of it to Foster and Stedman, who were directors of the bank; and these three became directors of the creamery. (35-36 59-60)

The Creamery was operating eight other creameries or milk stations under oral and written leases and continued to operate them until the bank was closed in November 1904.

After the transfer to Brown and under his management up to the time the bank failed, the business of the Creamery, correspondence, letters, bills, and everything, was all done in the name of the Creamery. And, as Brown said: "afterwards we continued the business in just the same way and so far as the bank is concerned there wasn't anything to show that there was any change in the business or way of doing business than before October 1st 1902." (36)

The Creamery had kept a deposit account in the bank prior to the transfer to Brown, and it continued

to keep "the account right along in the same way" until the bank closed. Checks received from the sale of butter were deposited in the bank account, and Brown drew checks in the name of the creamery in payment for milk that had been received by the different factories. (36) Exhibit 11. 96-103 64 and 79)

The Milk Sheets (106-107) of the different creameries, butter books and other records, not kept at the creamery, (77-78) were kept by Miss Madge Stedman at her house. (33 34 41 42)

The butter was all made and shipped from the Spring Lake Butter and Cheese Co. creamery at Marion, in the County of Waushara, the county adjoining Green Lake in which the bank and the Jenne Creamery Company were located. (62 63 64 65)

From data furnished by Miss Steadman, Brown made certain calculations at the office of the bank to determine the amount due the respective patrons and drew the checks for those amounts which were then mailed to the patrons by Miss Steadman. (33 36 80)

According to the method of conducting the creamery business, dairymen called patrons furnished milk to the creamery. The milk from all patrons as soon as it was received went into a separator, and the cream all went into one cream vat and then into the churn. Samples of the milk were taken from each patron several times a month and were tested by the buttermaker to determine what proportion of butter fat each patron furnished in his milk.

After the butter was sold an average was made of the test for the month for each patron to ascertain the amount of butter fat his milk furnished according to the test; and from that it was determined how much to pay him. After the butter was manufactured at the creameries under the manner in which the business was done, there was no way to determine what particular pound of butter belonged to any person who had furnished milk. (37)

The arrangement the creameries had with the patrons was that they were to make it into butter, sell it and divide the proceeds to the different patrons, the creamery taking as its pay for doing that work from three to three and one-half cents per pound, depending upon the market price of butter. (46 47 48 50-51)

The court found that the creamery company did not become the owner of the milk or the product or proceeds thereof, but that the patrons were at all times the owners and entitled thereto. Findings 12-14. (119-120)

Settlement with a patron was made by furnishing him a statement like Exhibit 19 (105) accompanied by a check for the amount shown by the statement. (64)

After the transfer of the creamery to Brown, and before any of the claims involved in this suit originated Metcalf, who was employed by Brown as foreman or manager of the business, and Brown himself on one or more occasions attended meetings of the stockholders and patrons of the several creameries and informed them among other things that Brown, Steadman and Foster were

now running the creamery; that Metcalf held stock and that all were actually interested in the business, and Metcalf referred them to Brown as the person in control; and after these statements made to the patrons, they continued to furnish their milk to the creamery company.

The patrons were also told that Jenne had sold out and that, "Brown is cashier and Stedman is going to run it in Jenne's name." (52) The patrons also noticed that the checks which had previously been signed by Jenne were after that signed by Brown. (51)

The testimony of Terrill, and of Atkins one of the plaintiffs, (49-56) contains statements of the knowledge which the patrons generally had that Brown had taken over the business of the several creameries. The testimony of Olsen, Leigh and Klapp (46 48 51) is to the same effect. See the evidence of Brown himself on this subject (61); The Atkins referred to above, president of the Spring Lake Company, and one of the plaintiffs, is the assignee jointly with his co-plaintiff Emigh of all the claims of the patrons of the creamery. Paragraph 50 of complaint. (23) And before this suit was brought the plaintiffs Emigh and Atkins each assigned to the other an undivided half interest of their claims against the creamery (114). Both were also patrons of the creameries. Atkins (10) and Emigh (14).

The leases of the Spring Lake Butter and Cheese Company are similar to the other leases. (69-71 89). The leases or agreements with the Marion and Mt. Morris, Seneca, Terrill, Black-Creek, Nes-

kora, Red Granite and Germania Creameries are found on pages 60, 65-69, 71, 72, 73 and 74.

In the operation of the creamery by Brown between October 7th and December 16th 1902, the creamery borrowed \$8,200.00 from the bank, and the sum of \$81.12 was advanced by the bank, all of which the court found was used in paying the checks of the creamery which were outstanding when the transfer was made. (97) Finding 27 (126).

The bank account of the creamery shows that during September October and November 1904, the checks paid out by the bank exceeded the deposits (102-103). On November 17th 1904, when the bank was closed the creamery owed the bank \$8,000.00 represented by its notes upon which nothing had been paid (76), and there was an overdraft of \$825.98 (76). Exhibit 11 (103). The amount therefore owed by the creamery to the bank at the time it was closed by the comptroller of the currency was \$8,825.98.

The property conveyed by the Jennes to Brown including the farm which realized \$4,000.00 went to pay the obligations of D. J. Jenne individually, and \$1400.00 thereof to pay the notes of the partnership of D. J. Jenne and Company; to the bank. (77)

So far as any debt of the creamery to the bank, is concerned existing at the time of the transfer to Brown, or afterwards incurred, there is no evidence that Brown ever paid or used any of the assets turned over to him by the Jennes to pay such debt or any part thereof at any time. He did, however,

pay off a large number of the debts, ten or fifteen in number, to other creditors than the bank. (36)

Brown finally turned over all the stock of the creamery company to S. B. Steadman, to whom it made a voluntary assignment in January, 1905. (60. 79) The year 1904 in the record is an obvious error we think.

The debts of the creamery at that time were something over \$14,000.00 (45). It had besides the bank a number of other creditors and its assets consisted of machinery, the different butter and cheese factories under lease, and the farm mentioned as belonging to D. J. Jenne personally, which assets were worth about \$7,000.00 (76).

There was no proof, neither was there any claim made by the plaintiffs that the board of directors of the Berlin National Bank took action as a board, directing Brown or any of its officers or directors, to operate the Creamery Company in the interest of the bank, or ever assumed or adopted or ratified his actions as assignee or trustee for the Jenne people as and for the bank, either formally or informally. Neither was there any proof, nor any claim made by the plaintiffs that the bank purchased or held any mortgage or assignment of the real estate and other property owned by it and its leased creameries. The court found, however, that Brown and the other two directors of the bank who took over the creamery were interested only for the bank, and that the agreement to take over the property was made by Brown for the bank, Findings 6-11 (118-119), that the bank received the milk, manufactured it into butter, sold it and collected the proceeds. Find-

ing 24 (124-125); that the bank kept the creamery account in a manner to conceal the actual condition of the account, Finding 28 (126-127), that though the business in form was continued by the creamery company, it was run by the bank. Finding 30 (127-128)

It also found as a fact though the officers and directors of the bank were held out as being interested in the creamery they had no interest, but were acting only for the bank and that this was not communicated by the bank to the patrons of the creamery. Finding 31 (128)

The court then made finding 32 (128) in which it is found that "the foreman employed by the . . . directors of the bank . . . informed certain of the patrons . . . that the directors of the bank were individually interested in the . . . creamery." There is no finding that the patrons *did not know* the bank was operating the creamery. It was found that the bank had notice of the rights of the patrons to the funds received from the sale of butter. Finding 34 (128) The court then found that a trust existed and made the decree that it be enforced against the Receiver. Finding 24 (124-125) Finding 35 (128)

ASSIGNMENTS OF ERROR.

The plaintiffs in error George C. Rankin, Receiver of the Berlin National Bank and the Berlin National Bank aver that there is error in the record and proceedings and decision and decree of the Supreme Court of the State of Wisconsin in this cause lately pending in that court wherein these plaintiffs in error were defendants and appellants and the defendants in error herein John Emigh and O. L. At-

kins were plaintiffs and respondents; in the following particulars, to wit: that,

1. The decision holding that the Berlin National Bank, by itself, or by any of its officers, board of directors, or agents, was conducting the business of the Jenne Creamery Company, and ordering the receiver of the bank to pay out of the funds in his hands claims of patrons or creditors of the Jenne Creamery Company is against the validity of the national bank act, particularly of sections 5133 and 5136 of the Revised Statutes which prohibit a bank from doing other than a banking business.

2. The decision holding the bank was bound by the operation of the Jenne Creamery Company business is against the validity of the national bank act and particularly of sections 5134 and 5190 of the Revised Statutes which prohibit a bank from transacting the business of the bank in any other place than where its banking house is located and that specified in its organization certificate.

3. The decision holding that the bank conducted the business of the Jenne Creamery Company is against the validity of the national bank act and particularly of section 5154 of the Revised Statutes which requires the affairs of a bank to be managed by not less than five directors.

4. The decision distributing the assets of the bank to the creditors of the Jenne Creamery Company is against the validity of the national bank act and particularly of sections 5236 and 5242 of the Re-

vised Statutes which require ratable dividends and prohibit all transfers with a view to preferences.

5. There is no evidence of any trust in any property in the hands of the Receiver or of the bank sufficient to charge the funds of the bank under the national bank act.

6. The finding of fact 31 (128), that the patrons of the creamery were not informed that the bank, instead of its officers and its directors, was the real party owning the stock and interested in the creamery; and findings of fact 28 (126), and 35 (128) as to alleged concealment and fraud and breach of trust on the part of the bank are inconsistent with the finding of fact 32 (128) that certain patrons were informed that the officers and directors of the bank were individually interested in the creamery; and said findings of fact 28, 31 and 35 are therefore insufficient to charge the bank under the provisions of the national bank act.

7. There is no evidence to support findings of fact 7, 8, 11, 30 and 31 (118. 119 127 128) as to the interest of the bank in the creamery company sufficient to charge the bank therewith under the provisions of the national bank act.

8. There is no evidence to support findings of fact 24, 27, 29, 30 and 33 (124 126 127 128) that the bank was running and operating the creamery sufficient to charge the bank therewith under the provisions of the national bank act.

9. There is no evidence to support findings of fact 26, 34 and 35 (126 128) as to the knowledge of the bank and breach of trust toward the creamery patrons sufficient to charge the bank therewith under the provisions of the national bank act.

10. There is no evidence to support findings of fact 28, 31 and 35 (126 128) as to fraud and concealment by the bank sufficient to charge the bank therewith under the provisions of the national bank act.

BRIEF OF ARGUMENT.

I.

THE FEDERAL QUESTION WAS PROPERLY RAISED ON THIS
RECORD IN THE STATE COURT.

Discussed *infra*, page 28.

Additional exceptions to findings of trial court
were filed (132-133).

Merchants Nat. Bk. v. Wehrmann, 202 U. S.
295, 299.

Not necessary to raise in trial court if claim made
in highest court of state.

Erie Railroad v. Purdy, 185 U. S., 148, 153.

By opinion of supreme court of state. (140-141).

*San Jose Land & Water Co. v. San Jose
Ranch Co.*, 189 U. S., 177. 179-180.

Also by certificate of Chief Justice (142-144).

Rector v. City Deposit Bank Co., 200 U. S.,
405, 412.

Also decision necessarily involved sections of the
national bank act.

Robey v. Colehour, 146 U. S., 153. 159-160.

II.

A NATIONAL BANK CANNOT UNDERTAKE TO OPERATE A
BUTTER FACTORY AND ENGAGE IN THE MANUFACTURE
AND SALE OF BUTTER, OR BE HELD TO HAVE ASSUMED
ANY OBLIGATIONS IN THAT BUSINESS.

Discussed *infra*, page 29.

If findings of fact by state court numbers 24, 27, 29, 30 and 33 (124-128) are binding on this court under *Egan v. Hart*, 165 U. S., 188, 189, and under *Waters Pierce Oil Company v. Texas*, 212 U. S., 86, 97-98, are the findings not mere conclusions of law, which evade the bank act?

If findings of fact as to bank operation of creamery must be accepted then:

A national bank has no power to do what the state court found this bank did.

Finding 30 to 34 (128).

Purpose and power of national banks.

Rev. Stat. U. S., 5133, 5136.

Bank ran business of creamery in several different counties of state.

Finding of fact 2 (117) (62 63 64 65).

Such operations beyond scope bank power.

Calif. Bank v. Kennedy, 167 U. S., 362.

First Nat. Bank v. Converse, 200 U. S., 425, 427-440.

Merchants Nat. Bank v. Wehrmann, 202 U. S., 295, 299-301.

Cooper v. Hill, 94 Fed. 582, 585, 587.

Sumner v. Marcy, 3 Wood. & Minot, 105, 113. Opinion by Mr. Justice Woodbury.

Allis Co. v. Standard Nat. Bank, 110 Fed. 47, 49.

Gause v. Commonwealth Trust Co., 196 N. Y., 134, 153-157.

State of Neb. v. Bank of Hemingford, 58 Neb. 818, 820.

Mr. Justice Brewer dissenting opinion in *Converse* case p. 441.

Such an act is an adventure beyond the confines of its charter.

Judge Hook in *Merchants Bank v. Baird*,
160 Fed. 642. 645.

Benefits received if returned would violate safeguard of bank act.

Mr. Justice White in *Davis v. Elmira Savings Bank*, 161 U. S. 275. 290.

III.

THE PLAINTIFFS AND THEIR ASSIGNORS HAD NOTICE OF THE FACTS UPON WHICH THE FINDING WAS BASED THAT THE BANK WAS OPERATING A BUTTER FACTORY, AND THEREFORE ARE ESTOPPED AND HAVE NO EQUITIES WHICH REQUIRE A DECREE FOR THE RETURN OF THEIR ALLEGED PROPERTY.

Discussed *infra*, page 35.

A. Milk patrons had notice of a fact which put them upon inquiry.

Finding 32, (128)

Findings 28, 31 and 35 (127, 128) that the bank did not communicate its interest to milk patrons does not affect notice.

There is no finding that patrons *did not know* the facts about the interest and acts of bank!

Milk patrons bound to pursue investigation of facts stated in finding 32.

Bispham's Eq. 2d ed. Par. 268, page 333.

2 Pomeroy Eq. 3d ed. Par. 608.

Cordova v. Hood, 17 Wall., 1. 8.

Wood v. Carpenter, 101 U. S., 135, 139. 141.

Kennedy v. Green, 3d Myln. & K. 699. 713.
719.

B. Milk patrons therefore presumed to have known all facts now relied on to support finding that bank was operating creamery.

C. It follows milk patrons bound to take notice of all restrictions in bank act.

a. Bank no power to operate manufactory.

Rev. Stat. 5133. 5136.

Sub. Div. II, *supra*.

b. Cannot carry on banking business in any other place than where banking house located.

Finding of fact 2, (117.) (62 63 64 65)

Rev. Stat. 5134. 5190.

c. National bank cannot hold real estate, except for certain purposes.

Rev. Stat. 5137.

While government alone could raise question as ruled in *Schuyler Bank v. Gadsen*, 191 U. S., 451. 458. it bears upon notice.

d. Affairs of a national bank cannot be managed by less than five directors.

Rev. Stat. 5154.

National Bank v. Drake, 35 Kans. 564.

e. Funds of bank could not be appropriated to any such claim or trust as asserted here.

Rev. Stat. 5236. 5242.

Purposes of bank act set forth by Mr. Justice White in *Davis v. Elmira Savings Bank*, 161 U. S., 275. 283. 286. 288. 289, and 284 and 290.

First National Bank v. Selden, 120 Fed., 212, 215.

A receiver represents shareholders of bank who are individually responsible under Revised Statutes 5155, 5234 to assessment to pay debts of bank.

Shareholders not liable to contribute to claim of creditors based on *ultra vires* act.

Schroader v. Manufacturers' Natl. Bank,
133 U. S., 67. 75.

All creditors national bank must share alike in funds raised from stockholders liability.

Richmond v. Irons, 121 U. S., 27, 48-49.

D. The equities on the side of the bank's *intra vires* creditors and the public are paramount to any alleged equities of the *ultra vires* milk patrons.

Though bank act has no penalty attached its terms prohibit bank and all persons dealing outside the sphere of powers.

Thomas v. City of Richmond, 12 Wall., 349, 356.

Because national banks are public and governmental agencies.

Easton v. Iowa, 188 U. S., 220. 229. 230. 238.

Mr. Justice White in *Davis v. Elmira Savings Bank*, *supra*.

Representing public and *intra vires* creditors are to be protected against unauthorized acts of officers and agents.

Thomas v. City of Richmond, *supra*, 356-357.

St. Louis R. R. v. Terre Haute R. R., 145 U. S., 393. 406-409.

Harriman v. Northern Securities Co., 197 U. S., 244. 295-296.

Illegality of bank's act relates to substance and not method of doing business.

Chapman v. County of Douglas, 107 U. S., 348, 356, commenting on *City of Richmond* case.

Transportation v. Pullman's Car Co., 139 U. S., 24. 58.-59. 60 reviewing cases.

Parkersburg v. Brown, 106 U. S. 487, 503.

Pennsylvania case, 118 U. S., 290. 317.

Litchfield v. Ballou, 114 U. S., 190. 194.

Plaintiffs must abide by equities of the case if they seek restoration of their property.

Bissell v. Michigan Southern Ry., 22 N. Y. 258. 305.

In contest between *intra vires* creditors and *ultra vires* claimants the former are preferred.

Bank of Chattanooga v. Bank of Memphis, 9 Heisk 408. 415.

State v. Bank of Hemingford, 58 Nebr., 818. 820.

2d Morse on Banking, 4th ed. 734b, 738. 746. 749b.

Argument of benefits answered by loss in the end. 96-101. 77.

Merchants Natl. Bank v. Baird, 160 Fed. 642. 646.

Argument that alleged trust conflicts with general law and that ground not sufficient to sustain judgment.

See Sub. IV *infra*.

E. Alleged trust has unlawful origin, because founded on violation of bank act.

Lewin on Trust, 1st Am. Ed. star page 20 and 94.

Recognition of trust creates preference hateful to policy of bank act.

Davis v. Elmira Sav. Bank, supra.

F. Trust will not be allowed if interferes with rights of others.

Litchfield v. Ballou, 114 U. S., 190. 195.

1 Perry on Trusts, 4th ed., sec. 171. 175.

G. The milk patrons because they had notice concurred in the alleged breach of trust and are estopped to claim innocence and injury or assert any alleged equity.

See discussion *supra* objections to alleged trust.

2d Lewin on Trusts, 1st Am. Ed. star page 918.

Loss should fall on milk patrons who were responsible for loss.

Friedlander v. Texas Railway, 130 U. S. 416. 425.

IV.

THE DECISION OF THE STATE COURT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS; BECAUSE THE ARRANGEMENT BETWEEN THE CREAMERY AND THE MILK PATRONS CREATED NO TRUST OR EQUITABLE CLAIM TO THE PROPERTY OR ITS PROCEEDS AND NEITHER THE CREAMERY NOR THE BANK IF THE LATTER BE HELD TO HAVE BEEN ENGAGED IN OPERATING THE CREAMERY WAS LIABLE TO THE MILK PATRONS AS TRUSTEE FOR THE PROCEEDS RECEIVED FROM THE SALE OF THE PROPERTY.

Discussed *infra*, page 66.

Decision wrong on non-federal ground for reasons, that;

A. No trust because mingling and confusion and conversion and loss of identity of property.

Findings 12, 13 and 14 justify no theory of a trust.

B. Plaintiffs cases merely decide that when a trust is established trust funds may be followed.

Union Stock Yards v. Gillespie, 137 U. S., 411.

National Bank v. Insurance Co. 104 U. S., 54.

Boyle v. N. W. National Bank, 125 Wis. 498.

C. There was no intention to create a bailment in the case at bar.

Finding 14 is a mere conclusion of law.

Mingling of milk lost identity (37). (46-48).

Butterfield v. Lathrop, 71 Pa. St., 225, 229-230. Sharswood, Judge.

Powder Co. v. Burkhardt, 97 U. S., 110. 116.

Chisholm v. Eagle Ore Sampling Co., 144 Fed., 670 to 673.

Harriman v. Northern Securities Co., 197 U. S., 244. 291-294.

D. Relation was that of debtor and creditor and not trust relation.

Marine Bank v. Fulton Bank, 2nd Wall., 252.

Bank of Republic v. Milard, 10th Wall., 152. 155. 156.

V.

THE DECISION OF THE STATE COURT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS BY REASON OF THE FACT THAT NOTICE TO OFFICERS OR DIRECTORS OF THE BANK WHICH CAME TO THEIR KNOWLEDGE WHILE ACTING AS OFFICERS OF THE CREAMERY CANNOT BE IMPUTED TO THE BANK, BECAUSE THEIR INTEREST IN ONE WAS ADVERSE TO THEIR INTEREST IN THE OTHER.

Discussed *infra*, page 76.

Decision State Court wrong on non-federal ground for following reasons:

Agreement between Jennes and Brown was not made or adopted by bank.

Brown's interest as director of creamery adverse to interest as director of bank.

A. Knowledge of bankrupt creamery and additional loans. Creamery on verge of bankruptcy.

Finding of Fact 4 (117-118)

Brown large owner of bank stock. (58)

B. Brown guilty of violation of bank act as to loan limit.

Rev. Stat. 5200.

Capital stock of bank \$50,000. (58)

Jennes individually and as partners owed \$7,200.
(40, 58, 77) Creamery owed \$8,200.

Finding 27, (126)

Brown liable civilly to stockholders and creditors.

Witters v. Sowles, 31 Fed. 1, 3.

Cockrill v. Cooper, 57 U. S. App. 576, 587.

Bank charter liable to forfeiture.

Rev. Stat. 5239.

Gold Mining Co. v. Rocky Mt. Bank, 96
U. S. 240.

C. Secret agreement as to preferences of creditors of creamery.

Trust deed not recorded and right to prefer creditors.

(91-92, 94-95)

D. The law as to adverse interest of directors.

Brown disclaims personal interest. (59, 78)

Seixas v. Citizens Bank, 38 La. Ann. 424,
435-436. Opinion by Mr. Justice Todd.

Re European Bank, L. R. Ch. App. 358, 362.

4 Thompson on Corporations, Sec 5214.

Seaverns v. Presb. Hospital 173 Ill. 414, 419.

Higgins v. Lansingh, 154 Ill. 301, 388.

President of bank right to administer estate of bank's creditor personally and recover for services.

Lowe v. Ring, 106 Wis. 647, 654-656.

Lowe v. Ring, 115 Wis., 575, 580.

VI.

THE DECISION OF THE STATE COURT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS BY REASON OF THE FACT THAT NOTICE AND KNOWLEDGE TO CERTAIN DIRECTORS OF THE BANK WHICH CAME TO THEM INDIVIDUALLY AND NOT WHILE ACTING AS A BOARD THAT CERTAIN OTHER DIRECTORS WERE OPERATING THE CREAMERY WAS NOT NOTICE TO THE BANK AND DOES NOT MAKE THE ACT OF THE DIRECTORS THE ACT OF THE BANK.

Discussed *infra*, page 87.

Decision State Court on this subject wrong and does not prevent review of federal question.

A. Individual directors only discussed the cashier's operation of creamery. (77)

Talked over by some directors, (35, 77, 78, 80)

Debt of creamery discussed. (77)

B. The law as to act of board of directors.

Means board sitting as such and not individual directors.

3 Thompson on Corporations, Par. 3906, 3908.

1 Morse on Banks, 4 Ed. par 124.

Nat. Bank v. Drake, 35 Kas. 564, 575, 576.

Edwards v. Carson Water Co., 21 Nev. 469, 491.

No ratification by bank and decisions in this court not opposed.

Railway Cos. v. Keokuk Bridge Co., 131 U. S. 371, 381-383.

Decisions in Wisconsin not contrary.

Bank of New London v. Ketchum, 64 Wis.,
7, 11.

Unusual act of bank president void.

Western Nat. Bank v. Armstrong, 152 U. S.
346, 351.

Act of officers in case at bar so far outside bank
charter as to avoid ratification by receipt of benefits.

See cases cited under Subdivision II, *supra*.

If finding of fact 8, 10, 11, 30, 34 and others are
binding on this court as to notice and knowledge
of bank that officers were running creamery and are
not mere conclusions of law, then Decision of State
Court wrong and federal question open for review.

ARGUMENT.

I.

THE FEDERAL QUESTION WAS PROPERLY RAISED IN THE
STATE COURT.

The receiver of the Berlin National Bank asserted title to the property sought to be subjected to the plaintiff's claim in the trial court; and on additional exceptions filed in that court to "the rulings and findings of fact and law and the judgment and decree of the Circuit Court" because contrary to certain sections of the national bank act therein specified. (132-133) The receiver and the bank itself thus declared their intention to rely upon the banking laws and claim immunity from the liability sought to be imposed, which is sufficient as is indicated by the opinion of Mr. Justice Holmes in *Merchants Nat. Bank v. Wehrmann*, 202 U. S. 295, 299. But if the judgment of the State Court was not then drawn in question on the ground that it denied rights under the bank act, those rights were claimed in the highest court of the State of Wisconsin as disclosed in the opinion of that court (140-141) and by the certificate signed by the Chief Justice and made a part of the record. (142-144)

Erie R. R. Co. v. Purdy, 185 U. S. 148, 153.

San José Land & Water Co. v. San José Ranch Co., 189 U. S. 177, 179-180.

Rector v. City Deposit Bank, 200 U. S. 405, 411-412.

The decision of the state court necessarily involved the sections of the national bank act.

Robey v. Colehour, 146 U. S. 159-160.

II.

A NATIONAL BANK CANNOT UNDERTAKE TO OPERATE A BUTTER FACTORY OR BE COMPELLED TO RESPOND TO ANY OBLIGATIONS INCURRED THEREBY.

The State Court found that the Berlin National Bank operated the Jenne Creamery Company and eight other creameries or milk stations from October 1st 1902 to November 17th 1904, when the bank failed and was placed in the hands of a receiver by the Comptroller of the Currency. Findings 24, 27, 29, 30 and 33. (124, 126, 127, 128.)

Our claim is that there is no evidence to support these extraordinary findings of the state court questioned in assignments of error number 8 *supra*. If in view of the decisions in *Egan v. Hart*, 165 U. S., 188. 189, and *Waters Pierce Oil Co. v. Texas*, 212 U. S., 86. 97 to 98, the findings are binding upon this court we suggest for the consideration of the court a further question. Are not these findings that the bank was operating the creamery mere conclusions of law which evade and deny the validity and operation of the bank act? If, however, such findings must be accepted, then our position is that under the decisions of this court and in view of the limitations of the national bank act, sections 5133 and 5136, the bank was powerless to operate the Jenne creamery factory.

That business involved the separation of cream

from milk, the manufacturing of it into butter, the marketing of the butter, the collection of the proceeds, and the making of statements and sending of checks in payment to about three hundred milk patrons.

If the bank in fact did run the creamery; it did so not only in the city and county where the bank and the Jenne creamery were located, but in other towns or localities in the county of Green Lake and in the adjoining county of Waushara; at nine separate creameries or milk stations all told.

Such operations are entirely beyond the scope of the powers conferred upon corporations generally and particularly a national bank.

Calif. Bank v. Kennedy, 167 U. S. 362.

First Nat. Bank v. Converse, 200 U. S. 425, 427-440.

Merchants Nat. Bank v. Wehrmann, 202 U. S., 295, 299-301.

Cooper v. Hill, 94 Fed. 582, 585, 587.

Sumner v. Marcy, 3 Wood. & Minot, 105, 113. Opinion by Mr. Justice Woodbury.

Allis Co. v. Standard Nat. Bank, 110 Fed. 47, 49.

Gause v. Commonwealth Trust Co., 196 N. Y. 134, 153-157.

State of Neb. v. Bank of Hemingford, 58 Neb. 818, 820.

It has been urged by the other side that the decisions of this court do not announce a principle which would condemn what is claimed to have been done by the bank in the case at bar. It is said that in the *Converse* case the national bank was held to

have exceeded its powers, because it was engaged in a purely speculative business or adventure, by taking stock in a corporation organized to purchase another corporation; and that the Berlin Bank was not engaged in a "speculative" scheme or adventure.

Mr. Justice Brewer in his dissenting opinion, page 441, affirms that manufacturing is beyond the authority of a national bank.

The Berlin National Bank took possession and operated according to the theory of the plaintiffs a creamery company for over two years. The creamery owed the bank nothing when it conveyed its property to Brown, unless an unnamed and uncertain overdraft; and at the end of two years when the bank failed, the creamery owed the bank nearly \$9,000.00! Was not that a purely speculative adventure? The state court found it was. Speaking of the arrangement of the bank to continue the creamery business the state court declared "and it was *hoped and expected* that there would be *some profit in the running and carrying on* of the Jenne Creamery Company's business," Finding 10 (119).

Could any act or business be undertaken which would be more clearly beyond the power of a national bank? "Such an act is an adventure beyond the confines of its charter," to use the expression of Judge Hook in reference to the act of a national bank in a case in the Court of Appeals.

Merchant's Bank v. Baird, 160 Fed. 642. 645.

Whether the bank had a right to take over the stock of the Jenne Creamery Company to secure a preexisting debt is not germane to the question at

bar. If that had been done for such a purpose, it would have been the duty of the bank to have disposed of the stock and to have converted it into money, but never to have operated the concern and engaged in the manufacture and sale of butter.

We assume that the Justices sitting here would not care to have us quote at length from the decisions of this court upon the subject; but there are several opinions on the Circuit and in the Court of Appeals, and several other courts which may be of interest. In a very able opinion by Judge Sanborn delivering the judgment of the Court of Appeals which was concurred in by Judges Thayer and Caldwell, it was said that when a national bank had been compelled to take an abandoned mining property whose shafts and drifts were filled with water, and whose machinery had been silent for months; that it had the right to clean it and make reasonable repairs and put it in presentable condition to attract purchasers, in the same way that an individual of sound judgment and prudence would do if he desired to make a sale of the property; but said Judge Sanborn, at page 586:

“The unfortunate part in this case is that they did not stop here. When the shaft had been cleared of water and the machinery had been put in operation, when the property was in proper condition for examination and for sale, and when no purchaser was found, they proceeded to expend \$18,864.82 more in prospecting for paying ore upon property in which none has ever been discovered. It was not only beyond their authority as officers of the bank but *ultra vires* of the bank itself, to carry on ordinary mining, manufacturing or trading business,—

much more to expend its money in such a speculative adventure in prospecting for ore where none of value ever had been found."

Cooper v. Hill, 94 Fed. 582. 586.

In *Allis v. Standard Nat. Bank*, 110 Fed. 47, Judge Coxe at page 49 says of a bank located in New York City;

"It is very clear that a national bank cannot operate a sawmill in Florida or conceive and carry out a scheme for carrying on such business through a dummy corporation which is the bank under another name. Such acts are *ultra vires*, unauthorized by the United States statutes and forbidden by law."

What is the difference between operating a creamery in an adjoining county from that in which the bank is situated, as was the Spring Lake Creamery, one of the leased stations of the Jenne Creamery Company; and doing the same thing in another state?

What sound distinction is there between a bank operating a sawmill or a gold mine and operating a butter factory?

In a forceful opinion by Mr. Justice Woodbury of this court in the case of *Sumner v. Marcy*, 3 Wood. & Minot 105, the public policy involved in the principle of law announced by this court in *Pearce v. Madison & Indianapolis Ry.*, in 21 How. 441, at 443, and in *National Bank v. Matthews*, 98 U. S., 621. 626, is well illustrated from the viewpoint of a manufacturing corporation attempting to go into the banking business.

A corporation chartered for sawing and manufacturing wood attempted to do a banking business. The learned Justice illustrated the fatal objections

to the validity of such an attempt in the following language, page 113:

“If they can lawfully embark in the business of the bank, and purchase its shares in order to facilitate loans from it, they can lawfully embark in any business which the lenders of money follow, and which may appear likely to further the loans desired. Thus if a lender be a manufacturer of cotton they may engage in that, or a maker of patent medicine, or an adventurer in the whale fisheries, they may engage also in such branches of business. And by parity of reasoning, the whole limitations and character given to a company in its charter for sawing and manufacturing wood may be prostrated and an act of incorporation for one object may be converted into one practically for all objects.”

These observations apply with added force to a national bank. The opinion of the Court of Appeals of New York in the recent case of the Commonwealth Trust Co. cited *supra*, contains apt language respecting the scope of the powers of a banking corporation. And the fact that the bank in that case had the further powers of what is known as a trust company does not weaken the argument when applied to a national bank.

This proceeding therefore cannot be maintained against the receiver, and the bank upon the ground that the act of the bank was within its charter power; though that has heretofore been the contention of opposing counsel and may be urged again in this court.

It may be claimed, however, that although the act of the bank in operating the butter factory was *ultra vires*, still the bank received the benefit of the

property and funds intrusted to it by the patrons of the creamery, and therefore equity and good conscience require that those alleged benefits should be returned; and the demands of the creamery patrons made, as the decree of the state court does make them, preferred claims over the *intra vires* creditors of this national bank and its stockholders, and regardless of "the wise safeguard in favor of all the people of the United States, resulting from the provision which secures to every one dealing with a national bank a ratable distribution of the assets thereof."

Mr. Justice White in *Davis v. Elmira Savings Bank*, 161 U. S., 275. 290.

That contention brings us to the discussion of the next subdivision of our argument.

III.

PLAINTIFFS AND THEIR ASSIGNORS HAD NOTICE OF THE FACTS UPON WHICH THE FINDING WAS BASED THAT THE BANK WAS OPERATING THE BUTTER FACTORY AND ARE ESTOPPED, TO CLAIM THAT THERE WAS FRAUD OR THAT A TRUST EXISTS.

This discussion has been grouped under the following heads:

- A. The milk patrons had notice of a fact which put them upon inquiry.
- B. The milk patrons are therefore presumed to have known all the facts now relied on to support the finding that the bank was operating the creamery.

- C. It follows that the milk patrons were bound to take notice of all the restrictions in the bank act here specified under the sub-heads, a, b, c, d and e *infra*.
- D. The equities on the side of the bank's *intra vires* creditors and of the public are paramount to any alleged equities of the *ultra vires* milk patrons.
- E. Alleged trust has unlawful origin because founded on violation of bank act.
- F. Trust will not be allowed if interferes with rights of others.
- G. The milk patrons because they had notice concurred in the alleged breach of trust and are estopped to claim innocence and injury or assert any alleged equity.

A.

The milk patrons had notice of a fact which put them upon inquiry.

Without regard to the question whether this court is bound by the findings of fact made by the state court where there is no evidence to support them, that court made one finding of fact which must be accepted and by which the plaintiffs are bound.

In finding 32 (128) it is declared by the court that the foreman employed by the officers and directors of the bank informed certain of the patrons that the officers and directors of the bank were *individually* interested in the Jenne Creamery Company.

The evidence heretofore referred to clearly shows that they were told that Brown was the cashier of the

bank, and that Brown, Steadman and Foster, the bank officers and directors were operating the creamery.

We have claimed in assignment of errors number 6 that the other finding 31, that the patrons were not informed that the bank was operating the creamery, is inconsistent with finding 32, that the patrons were informed that the officers and directors of the bank were individually interested in the creamery. Our contention is that the findings that the bank did not tell the patrons what it was doing, and that it was running the creamery have no evidence whatever to sustain them. But whether those findings are well founded or not the patrons had notice of a fact which put them upon inquiry; and they were bound to pursue the investigation which knowledge of that fact opened the way for them to make. The duty resting upon them is well stated in Bispham's Eq. 2 Ed. Paragraph 268, at page 333:

"Anything which puts a person upon inquiry is said to amount to notice. He is bound, if circumstances point out a path of investigation, to follow it. If he makes no inquiries, the presumption is that he has improperly turned away from a knowledge of the true state of the case, and he is, therefore, presumed as a conclusion of fact to know what he might have informed himself of."

See also

2 Pomeroy Eq. 3rd Ed. par. 608.

The patrons were informed that three officers and directors of a national bank had taken possession of a butter factory with which they had done business before, while it was run by the Jenne family. Sud-

denly they learned from Jenne and from the bank officers and their agents, that these three bank officers and directors had taken possession of and were operating this manufactory. They were chargeable with notice of the national bank act, and of the powers and duties of the bank and of the officers and directors of such an institution. It was therefore their duty to inquire whether the officers of the bank had authority from the bank, and whether or not it was true that they were *individually* interested in the creamery, or only for the bank with which they were connected. The pursuit of that inquiry would have led them to the very facts upon which the state court found that this national bank was the party in interest and that the officers were not, and that the bank was running it and not the directors. They knew that a bank had power to take such a property as security for a pre-existing debt, but not to run it. They should have inquired for what purpose these men, charged by the bank act as trustees to manage and control a national bank for stockholders, depositors and the public, had suddenly taken over a going manufacturing concern.

In the case of *Cordova v. Hood*, 17 Wall. 1, a deed informed the purchasers that the consideration was unpaid. The court held that the duty was imposed upon them of inquiring whether it remained unpaid when they were about to make their purchase. Mr. Justice Strong in delivering the opinion of the court said, at page 8:

“Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he per-

formed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself. * * * The deed pointed to the person from whom purchasers from Hood were bound to seek information."

The fact that three directors, one of them the president and the others the cashier and assistant cashier of a national bank, and known to these patrons as such, were now claiming to own the creamery, pointed to the bank as the source of knowledge which they now affirm was unknown to them.

An instructive case on this subject is *Wood v. Carpenter*, 101 U. S., 135, in which the decision was delivered by Mr. Justice Swayne. The question was whether certain judgments by confession were *bona fide* judgments or shams. Mr. Justice Swayne said at Page 139:

"The judgments confessed were of record and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams."

On page 141, the court cites with approval cases where one person had given money to another to pay certain debts for him and relying upon the affirmation, which proved to be false, that the debts had been paid, it was declared that the plaintiff had the means of discovering the truth by making inquiry of those to whom they were said to have been paid.

A second case was that of a man who handed money to another to be deposited in bank and relying upon the false statement that the money had been deposited he failed to make inquiry, and the court

said he could at all times have inquired of the bank, and was responsible for not having done so.

Another man relied upon a denial of the ownership of a vessel when the reputed owner was asked to pay for repairs upon it, and it was held that delay in ascertaining that fact was not excused because the ownership might have been ascertained from other sources.

Mr. Justice Swayne cites with approval *Kennedy v. Greene*, 3 Myl. & K. 699. In that case the Master of the Rolls, Sir John Leach, said at page 713, with reference to certain irregularities in the form of a deed that,

“It is said that Kirby employed no solicitor; that he therefore is not to be fixed with those circumstances apparent upon the deeds which would have led other persons to indulge suspicion. Such a proposition is not to be entertained in any court of justice.”

On rehearing before Lord Chancellor Brougham, he declared what is quoted by Mr. Justice Swayne in the opinion in *Wood v. Carpenter*, at page 719:

“Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for the want of investigation.”

If as this court has held in the *Wood* case a man who knew of judgments by confession was bound to ascertain whether they were shams, and one who had given money to a man to pay certain debts was bound to inquire from the creditors whether they had been in fact paid, and the man who had given

to another money to be deposited for him in a bank was bound to inquire from the bank whether the deposit had been made, why were not these milk patrons bound to inquire from the bank whether its officers were interested for themselves, or for the bank and thus ascertain who was running the creamery? They were told that three officers and directors of a bank with which the creamery had been doing its banking business and upon which their checks had been drawn and paid were individually interested, and their silence now either admits they knew, or that they have no excuse for having closed their eyes to the truth.

The statement that the officers and directors of the bank were *individually* interested was equivalent to a statement that the bank was *not* interested. Bank officers "*individually interested*" called attention to their own interest as distinguished from the *bank's* interest! Why? because every man knows that bank officers are chosen to look after the interest of the bank. The patrons were therefore told, "though we are bank officers, we are not interested for the bank in the creamery but we are *individually* interested in the creamery"!

Is that true?—would be the first question to arise in the mind of any man of sense. Could these patrons shut their eyes and refuse to seek the answer? If they did, they are presumed to know what they might have learned by investigation! The means were at hand to learn the truth of the statement.

If at any stage of an inquiry the patrons had been balked by refusal or deception on the part of the bank, another question might be presented.

B.

The milk patrons are therefore presumed to have known all the facts now relied on to support the finding that the bank was operating the creamery.

Finding of fact 32 must be accepted. If accepted then the other findings of fact that the bank or any other person did not make known the fact that the bank was operating the factory, must be disregarded if inconsistent with the finding that compels the court to presume they did know, or as immaterial or as mere conclusions of law. Finding 32 destroys such findings as 28, 31 and 35 if they conflict with it.

But that alternative is not even necessary. There is no finding that the patrons *did not know* the bank was running the business. Finding 28 contains no statement relevant to this subject of failure to notify the patrons that the bank was operating the creamery. Number 31 finds that the fact that *no interest* existed in the directors apart from the bank, was not communicated by the bank. That does not conflict with the fact found in number 32, that they were informed that the directors of the bank were *individually* interested. The patrons did not inquire of the bank! Theirs was the duty to inquire. Not the duty of the bank to communicate any information on that subject unless requested. No inquiry having been made by the patrons whose duty it was to inquire as to the truth of a fact of which they were informed; they are conclusively presumed to have known all the facts about the operation of the creamery by the bank and are estopped to deny that knowledge.

C

It follows that the milk patrons were bound to take notice of all the restrictions in the bank act here specified under the sub-heads, a, b, c, d and e infra.

Because of the notice which the patrons are presumed to have had that the bank was interested and that its officers and directors were not individually interested, they were bound, as this court has so often declared, to take notice of all the restrictions of the organic law of national banks. From their notice and knowledge of these limitations upon the bank's power certain equities arise.

These restrictions are;—

(a) Bank has no power to operate a butter factory.

Revised Statutes U. S. 5133, 5136.

(b) Cannot carry on business in any other place than where the banking house is located and that specified in organization certificate.

Revised Statutes U. S. 5134, 5190.

(c) National Bank cannot hold real estate for any other than banking purposes and that acquired under certain restrictions.

Revised Statutes U. S. 5137.

(d) Affairs of a national bank cannot be managed by less than five directors.

Revised Statutes U. S. 5154.

(e) Funds of a national bank cannot be appropriated to any such claim or trust or lien as asserted here.

Revised Statutes U. S. 5236, 5242.

(a)

Bank has no power to operate manufactory.

This first restriction of the power of a national bank to engage in a manufacturing business has been considered under Subdivision II, *supra*. Assignments of Error 1.

(b)

Cannot carry on banking business in any other place than where banking house located.

These sections of the law Rev. Stat. 5134 and 5190 are not subject to any unreasonable construction which would restrict the bank to a single room or building. But what did the Berlin Bank attempt to do, if the theory of the state court is sound? The banking house was located and it had been doing business ever since its organization in the city of Berlin in Green Lake County Wisconsin. Finding of Fact 2. (117)

Not only did the bank operate these creameries in several other places in Green Lake County, one of them being the Town of St. Mary, but it operated the Spring Lake Butter & Cheese Company which was located in the Town of Marion and County of Waushara, the adjoining county to that of Green Lake. All the butter for all of the other creameries was made in and shipped from the Spring Lake Creamery in Waushara county. (62, 63, 64, 65.) Certain portions of the accounts of all the business that was being done by the Jenne Company and the leased creameries were kept at the Spring Lake Creamery. (64)

This restriction in the bank act is a wise one and would seem to have been designed to meet a case like this. If operating a butter factory in an adjoining county of the state to that in which the banking house is situated and the established business of the bank is transacted does not violate the law, it is difficult to imagine a case where this section would apply.

(c)

National bank cannot hold real estate except for certain purposes.

If the State Court's theory is right, this national bank held for two years leaseholds of eight creameries which had from three to five years to run. The real estate was not acquired in any of the modes described by Section 5137 or for any of the purposes there recognized as rightful. True, the government alone could raise the question, as ruled in *Schuyler National Bank v. Gadsen*, 191 U. S. 451, 458, but when we are talking of presumptions and notice and equities, it is important to consider this limitation upon the power of a national bank.

(d)

Affairs of a national bank cannot be managed by less than five directors.

The act of the bank, if it really did take over these creameries and operate them for two years, was such an extraordinary one that it would seem that the Section 5145 of the bank act, which requires that its affairs shall be managed by not less than five directors, would confer no authority upon Brown, Stedman and Foster, three of the directors, to do

an act entirely outside of the limits of its charter when the law required acts within the scope of its charter powers to be undertaken and managed by five directors. There is no pretense in this case that there was any action by the board of directors at any time in respect to the affairs of the creamery company, and it is held in *Nat. Bank v. Drake*, 35 Kans. 564, that the only powers conferred upon directors or vested in them as a board is when acting as a unit, and that the assent of a majority of the individual members acting separately or singly is not the assent of the bank and not binding upon it.

(e)

Funds of the bank could not be appropriated to any such claim or trust or lien as is asserted here.

The alleged trust said to exist between the creamery company and its patrons we deny. But if there was a trust between the patrons and the creamery company, mere notice to a bank with which the creamery was doing business would not fasten that trust upon the funds handled by the bank in the ordinary course of banking business. To fasten a constructive trust upon the bank, the plaintiffs are required to go further and show that the bank was running the creamery and concealed that fact from the patrons. But if our contention is correct, that the patrons had notice of all that was being done, even on the theory of the finding by the State Court that the bank was operating the creamery, any such alleged lien or trust or claim to be preferred violates the express provision of the bank act.

The purposes of Sections 5236 and 5242 are clearly

set forth by Mr. Justice White in *Davis v. Elmira Savings Bank*, 161 U. S., 275, 283. On page 286 he quotes from the *Cook County Bank* case the language of Mr. Justice Field, which affirms that,

“The sections directing ratable distribution provide for the distribution of the entire assets of the bank, giving no preference to any claim, except for moneys to reimburse the United States for advances in redeeming the notes.”

It was held in that case that outside of the express provision in the act for reimbursing the federal government itself, the United States could not as a creditor, have any preference over other creditors, even though created by a general law of the United States.

And in the *Davis* case it was held that this ratable distribution provided by the national bank act could not be overthrown by the provisions of the general insolvent statute of the State of New York, directing distribution in another manner. The decision of the state court in this case does no more than the act of the State of New York attempted to do. That statute in effect required that persons who deposited money with a national bank should be treated as the owners of an equal sum of money in the national bank when it became insolvent. The statute was held to violate the act of Congress providing for ratable distribution. It was recognized however that where by any state law a lien was made to result from a particular contract, the lien when its existence is not incompatible with the act of Congress, will be enforced. It was also held where a particular contract is made by a national bank which from

its nature gives rise at the time of the contract to a claim on a specific fund, such claim if not violative of the act of Congress, will be allowed (pages 288, 289).

The claim of the plaintiffs is based upon an act which is prohibited by the bank act. Now even if there were "a state law," to use the language of Mr. Justice White, by which the patrons became entitled to a lien upon the funds in the bank, that lien could not prevail if its existence was in any way "incompatible with the act of Congress." Such lien could not be enforced as Mr. Justice White again points out in the *Davis* case. Or if there were any contracts subsisting between the bank and its patrons by which the latter were entitled to any claim "on a specific fund," even such a high and superior right would be compelled to yield if it were found "violative * * * of the act of Congress."

The spirit of the bank act is well stated by Mr. Justice White, on page 284, where he says:

"It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. This public aim in favor of all the citizens of every state of the Union is manifested by the entire context of the national bank act."

The ruling in the case at bar cannot be justified under any principle established with reference to the distribution of the assets of a national bank. There is no warrant to be found for it, in the opin-

ion of Mr. Justice White, given in the closing language of the *Davis* case, (p. 290), where he says:

“Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation.”

If it be argued that the judgment of the state court is merely the application of the general equitable law, recognized by courts everywhere, which gives the plaintiffs a lien upon these funds, and permits them to trace them into the hands of the receiver, the reply is that the foundation of their claim is an alleged undertaking of the Berlin National Bank to engage in the manufacture and sale of butter, which conflicts with the letter and the general objects and purposes of the bank act.

The plea made by the milk patrons of injustice in denying their claim to the assets of this bank is answered by Mr. Justice White in the closing sentence of the opinion, that:

“We should not be unmindful of the wise safeguard in favor of all the people of the United States, resulting from the provision which secures to every one dealing with a national bank a ratable distribution of the assets thereof, thereby stimulating confidence and uniformity of treatment.”

In concluding this branch of the discussion, we call attention to the case of *First National Bank of Chicago v. Selden*, 120 Fed., 212, in which Judge

Grosscup, delivering the opinion of the Court of Appeals, says, on page 215:

"It is clear that as against the receiver, executing his trust, the federal law alone is applicable. In such a case the federal trust must be administered according to the mandate of the federal law. The moment the Niles Bank went into the hands of the receiver the federal law became the law of the distribution of its assets. In no other way could there be unity of administration and a carrying out of the federal mandate of equality."

The court further held in that case that although the Illinois law on the subject of checks and drafts and their effect, was different and diametrically opposed to the general commercial law as administered in the federal courts on the subject of negotiable paper, "the Illinois law cannot be allowed to displace the federal law looking to a ratable distribution among the creditors."

It is submitted that there is no law in Wisconsin or any other state that would give relief to the plaintiffs; but even if there were such a law, it must give way before the federal law, and the preference here sought to be enforced cannot be allowed.

Not only the general creditors of the bank who trusted it as doing a banking business, but the shareholders of the bank are vitally interested. They are both represented by the receiver here who is charged with the duty of protecting their rights under the law. Section 5151 of the Revised Statutes, makes shareholders of a national bank individually responsible for all the debts to the extent of their stock subscription in addition to the amount

invested, and the Comptroller of the Currency is authorized (Sec. 5234) to levy an assessment upon them, and enforce this individual liability.

The injustice of the decree in this case is strikingly illustrated when we consider that the general creditors of the bank cannot require the stockholders to contribute to replace that portion of the assets of this national bank which will be withdrawn if the decree in this case is allowed to prevail. This court has decided in *Schrader v. Manufacturers' National Bank*, 133 U. S., 67, 75, that shareholders are not liable to contribute to a claim of creditors based upon an act beyond the powers conferred upon national banks. And it is further decided, in *Richmond v. Irons*, 121 U. S., 37, 48-9, that all creditors of a national bank must share alike in the funds arising from the enforcement of the stockholders' liability.

Thus these creamery patrons, *ultra vires* creditors, reduce the assets of this national bank, and the general *intra vires* creditors cannot resort to the shareholders' liability to make good that loss. Suppose every dollar of the assets of the Berlin National Bank had been dissipated;—these *ultra vires* creditors could not have shared in the fund collected by the receiver from the shareholders, no matter how large it may have been. And yet the ultimate effect of the decree, which withdraws for their benefit a certain sum from the assets of this bank, is the same.

The sound conclusion would seem to be that the whole spirit and purpose of the bank act requires every one dealing with a national bank to take no-

tice, *first*, of the public policy which prohibits a bank from engaging in a business such as that of operating a butter factory; *second*, of the interests and equities of the creditors who dealt with the bank in a strictly banking business; and *third*, of the equities of the stockholders.

D.

The equities on the side of the bank's intra vires creditors and of the public are paramount to any alleged equities of the ultra vires milk patrons.

The question which then presents itself is whether or not the equities upon the side of the public, the *intra vires* creditors and the stockholders are not superior to those of these *ultra vires* claimants? It is true there is no penalty affixed to the prohibition in the national bank act, to engage in a manufacturing business, as there was in the statute involved in *Thomas v. City of Richmond*, 12 Wall., 349. But does not the principle announced in that case rule the *Berlin Bank* case? The prohibition of the bank act extends alike to persons dealing with the bank and the bank itself, in a sphere so clearly outside its charter powers. The act is not immoral, but it is as was said by Mr. Justice Bradley in the *City of Richmond* case at page 356 "tainted with illegality."

The delivery of milk to a national bank to be manufactured into butter and sold, is aptly described, by adopting the further language of Mr. Justice Bradley, as property "loaned or advanced for the purpose of aiding in an illegal . . . transaction."

In delivering and receiving, the milk patrons and the bank were *in pari delicto*.

In *Easton v. Iowa*, 188 U. S., 220, this court in an opinion delivered by Mr. Justice Shiras considered the public nature of national banks very fully; and at page 229 it is said that

“Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain.”

And it was also held that though the principles enunciated in *Osborn v. United States Bank*, were in respect to banks created directly by acts of Congress, they were applicable to the present system. The language of Mr. Chief Justice Marshall that “The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes,” was quoted with approval.

And the declaration in the *Dearing* case was referred to on page 230 as a similar view frequently expressed by this court as to the nature of national banks. In that case it was said “National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end.”

The question of *private gain* by the Berlin National Bank does not enter into the question whether these milk patrons shall be reimbursed for their *private loss* as opposed to the *private gain* of that national bank. The question is shall the private gain

of the milk patrons dominate the public gain and security and protection which the bank act was designed to give to the bank's rightful creditors and stockholders and to the public?

It is not a question of private *gain* or private *loss* of these plaintiffs; but whether national banks can serve the public and national *purpose* for which they are organized and can continue to be instruments designed to be used to aid the government in the administration of an important branch of the public service, when they are exploited in this manner.

To place the seal of approval upon what was done here "impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which," the bank act was designed, as declared by Mr. Justice White in the *Davis* case, referred to with approval by Mr. Justice Shiras in his opinion on page 238 of the *Easton* case.

By the repeated and well settled adjudications of this court respecting the nature of national banks they are thereby placed in the class of public corporations spoken of in the *City of Richmond* case. The safeguards intended to be thrown around them by the bank act are as accurately stated by the language of that case as if it had been written of that class of corporations. It is said at page 356, by Mr. Justice Bradley, that;

"They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. * * * Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and, are to be held responsible accordingly."

It is not an "injury to third parties" to deny relief to these plaintiffs, because they made their own bed and they must lie in it. The court does not do them an injury, the injury if any, is self inflicted!

It was a flagrant abuse of the public franchise conferred upon the bank to operate a butter factory, and the milk patron was chargeable with notice of the wrong "and should have no remedy, even for money had and received, against the corporation which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril."

Thomas v. City of Richmond, 12 Wall., 349.
356-357.

St. Louis R. R. v. Terre Haute R. R., 145
U. S., 393. 406-409.

Harriman v. Northern Securities Co., 197
U. S., 244. 295-296.

An action bearing such a "taint of illegality" is placed upon the same footing as are "penal offences" by the *City of Richmond* case. That principle upon the ground of *public policy* will not permit a national bank to perform or permit others to aid it to perform an illegal act so contrary to the wise restrictions of the bank act.

In commenting upon this case in *Chapman v. County of Douglass*, 107 U. S., 348, Mr. Justice Matthews at page 356 distinguishes the *Chapman* case from the *City of Richmond* case by showing that the

illegal contract in the former did not relate to the *substance*, but simply to the mode of performance. In the latter case the County of Douglass was expressly authorized to purchase a farm for the use of its poor. The agreement for the *mode of payment* alone was not authorized.

The act of the milk patrons in delivering milk to the Berlin Bank and the act of the bank in receiving it and attempting to carry on the manufacture and sale of butter, related not to the mode of performing, but to the very heart and substance of a transaction which was illegal upon the part of all concerned.

The numerous cases distinguished by Mr. Justice Gray in *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S., 24, leaves little to be said. On pages 58 to 59 the learned Justice points out the ground upon which the decision proceeded in *Parkersburg v. Brown*, 106 U. S., 487. 503. In the *Brown* case the city had received title to certain property, but did not have power to carry out its promise to pay for it in bonds. The quotation from that case shows that the relief was based upon the fact, that while the city had been guilty of a illegal act, it was declared that as to the act of the other party;

"There was no illegality in the mere putting of the property * * * in the hands of the city."

When the milk patrons delivered their milk and put that sort of property into the hands of the Berlin Bank to be manufactured into butter and sold, their act was as illegal as the act of the bank in receiving

it. The patrons and the bank were joint-offenders. Again on page 60 of the *Pullman* case the further language of Mr. Justice Gray is peculiarly appropriate, where he says:

“But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws.”

The true rule which seems to us must govern the decision of the case at bar is found in the quotation from an opinion by Mr. Justice Miller in the Pennsylvania case in which he affirmed that,

“Where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.”

The ground of a refusal to interfere in a case like this is that there are *superior* equities on the part of the *intra vires* creditors and of the stockholders, and of all the people of the United States who are concerned in the question whether men with their eyes open can engage in this sort of business with a national bank, and when they lose in such a speculative venture ask to be made preferred creditors as against those who dealt with the national bank in lawful transactions without notice or knowledge of unlawful ventures. And such persons *have a right* to rely upon the assurance and security which the bank act intended should be a “safeguard” in fact, and not in name only.

Speaking of the constitutional prohibition of a city to become indebted in a sum exceeding a certain percentage of its taxable property, Mr. Justice Miller said in *Litchfield v. Ballou*, 114 U. S., 190, 194:

“The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared.”

Is not the prohibition against a national bank engaging in manufacturing business as strongly declared to be the public policy of the bank act as if it were stated in so many words?

The plaintiffs have come into equity and they must do equity. This principle which must control the determination of their rights is indicated by Judge Selden in the leading case of *Bissell v. Michigan Southern Railway*, 22 N. Y., 258, at page 305, where he says the suit to compel restoration of what has been obtained by a corporation under an engagement prohibited by law is “founded upon the equities of the case.”

The act of the milk patrons was voluntary, the burden sought to be laid upon the persons which the bank act was designed to protect is involuntary. At law the bank creditors have at least as good title to the assets of this bank and as much equity as the milk patrons to the proceeds of their milk changed first into cream and then into butter and finally into money and all done by a national bank with their full consent.

But we do not need to rely upon the maxim which

fits this case that "Where Equity is Equal the Law must prevail," for the equity of the *intra vires* creditors who are innocent is clearly superior to any alleged equity of the *ultra vires* milk patrons who knowingly engaged with a national bank in an illegal enterprise.

"Equity assists ignorance but not carelessness"

Plowd. 84 and

"Equity assists nobody to the injury of another."

Loft. 397.

Judged by such rules, as they must be in the last analysis of this case, these plaintiffs have no equity as against the equities on the side represented by the receiver of this insolvent national bank who is a trustee for the *intra vires* creditors and the stockholders, and the public.

This distinction, which has been made in the cases cited *supra*, is nowhere more clearly set forth than in the language of the Supreme Court of Tennessee, in *Bank of Chattanooga v. Bank of Memphis*, 9 Heisk, 408, at 415, where Mr. Justice McFarland says:

"We think it clear that in a contest between the creditors of an insolvent bank, those creditors whose debts were created under the lawful power given by the charter are to be preferred to those who claim under a contract that the bank, under its charter, had no power to make."

The same question was decided by the Supreme Court of Nebraska, in a case where a state bank

thought that instead of doing a banking business, it could turn storekeeper, and buy and sell merchandise.

In *State v. Bank of Hemingford*, 58 Neb., 818, Mr. Chief Justice Harrison said at page 820:

“It will be presumed that the depositors dealt with the bank as a bank, and not as a storekeeper, and believed it to be and trusted it as engaged in legitimate banking, and not in ventures or transactions not contemplated in the articles of its incorporation . . . and are entitled to demand of right that the funds diverted and employed for purposes other than a banking business . . . be appropriated to the payment of their just claims against the bank, to the exclusion of parties who have accounts against the bank which originated exclusively in the unauthorized business.”

That is precisely like the case at bar. The defense is not made by the bank itself, though it is a party to the record, but by the receiver, for the benefit of creditors of the bank, who dealt with it, and trusted it, as doing a banking business, against creditors whom the court holds dealt with it as a creamery and butter factory.

The rule is also stated in 2nd Morse on Banking (4th Ed.) 734b, 738. 746. 749b.

The plea that there would be injustice in allowing the bank to retain the benefits of its illegal act is answered by Judge Hook in *Merchants Bank v. Baird*, 160 Fed., 642. 646, where he replies to that argument by saying “It is urged that the national bank profited by the transactions to the extent of exchange and that it retained the benefit. It is dif-

ficult to find any profit to the bank in these transactions. If there was any it was swallowed up in losses."

That is strikingly and fatally true of the Berlin bank! The whole undertaking of the bank, whatever it was, of operating or dealing with the creamery business, was of no benefit to the bank from beginning to end, viewed in any aspect.

Brown the manager of the creamery *used its property to pay its debts* to others than the bank, and then turned over what was left to the assignee of the creamery and not to the bank. When the bank went into the butter business it was not involved with the creamery company in any amount except a visionary overdraft in an amount not indicated; and within a few weeks the bank was a creditor of the creamery alone to the extent of over eight thousand dollars, and when its doors closed nearly nine thousand dollars!

The entire Jenne combination, under the three forms or names assumed, owed the bank at first \$7,200. which was reduced during the two years by only \$1,400., while it was increased by \$8,825., leaving the bank involved to the extent of \$15,625. at the end, instead of only \$7,200 when Brown embarked in the enterprise now alleged to have been an undertaking of the bank. At least \$16,000 in loans appear in the account between October 7, 1902, and the early part of 1904 (96-101). Instead of the bank running the creamery company, it looks like the creamery company under Brown was running the bank and looting it for the benefit of Brown and his friends, the Jennes.

This losing venture, described by Brown as a situation of the creamery company without "any material change except a gradual loss," (77) is the fabric out of which these "patrons" of a milk and butter factory seek to weave a constructive trust around the assets of a national bank.

Reenforcing the argument that the alleged trust or equitable lien upon the assets of the Berlin bank conflict with the general objects and purposes of the bank act, we have discussed under subdivision IV *infra*, the alleged arrangement between the creamery and the milk patrons independently of any connection or privity of the creamery and the bank; and have there shown we think that no trust was created by the delivery of milk to the creamery. If so the decision of the state court is wrong on that basic ground upon which they have reared this complicated structure of a constructive trust which they say towers above and dominates the express trust created by the bank act in favor of the legitimate creditors of the bank.

E.

Alleged trust has unlawful origin, because founded on violation of bank act.

There is another and a controlling reason why there can be no trust in this case and that is that the law forbids it. In distinguishing the classes of trusts into lawful and unlawful, Lewin states that,

"The latter are trusts created for the attainment of some end contravening the policy of the law, and therefore not to be sanctioned in a forum professing not only justice, but equity, as

a trust to defraud creditors or to defeat a statute."

Lewin on Trusts, 1 Amer. Ed. star page 20.

The trust sought to be established here does both. It contravenes the policy of the national bank act and it defrauds the creditors of the insolvent bank. The same authority again states the rule thus:

"The court will not permit a system of trusts to be directed to any object that contravenes the policy of the law." Star page 94.

It is the "policy of the law" that the assets of the national bank shall be ratably distributed. *Davis v. Elmira Savings Bank, supra*. The recognition of a trust here permits a preference hateful to the law and condemned by this court.

F.

Trust will not be allowed if interferes with rights of others.

A trust will not be declared if it cannot be done without "injuring other persons or interfering with others' rights" said Mr. Justice Miller in deciding the case of *Litchfield v. Ballou*, 114 U. S., 190, 195. And there is no conceivable way by which a trust can be declared in this case without injuring other persons or interfering with others' rights. If these milk patrons are to be preferred, it is only to be accomplished at the cost of innocent persons.

Perry states the rule thus: Even in cases of fraud

"A trust will not be declared if thereby in effect the beneficiary would receive the benefit of the

fraud at the expense of a third party equally innocent."

1 Perry on Trusts, Sec. 171, 4 Ed.

Again it is said by the same author, that,

"If the misrepresentations, though fraudulent, are so vague and uncertain that they ought not to mislead a reasonable man, but should rather put him upon inquiry, he can have no relief."

Idem sec 175

It is in evidence here and the court found that these plaintiffs had notice that the directors of the bank were interested in the creamery; they will be charged with notice of the national bank act, and if they erred or were mistaken, they erred in the face of light and knowledge.

G

The milk patrons because they had notice concurred in the alleged breach of trust and are estopped to claim innocence and injury or assert any alleged equity.

There is still another reason why this trust cannot be maintained. The record shows that these patrons concurred in everything that was done with reference to their rights and the law is "if a *cestui que trust* concur in the breach of trust, he is forever estopped from proceeding against the trustee for the consequences of the act." 2 Lewin on Trusts, 1 Amer. Ed, Star page 318.

Gathering together all the objections to this alleged trust or equitable lien with the notice which the milk patrons are by law, as discussed *supra*,

presumed to have had, they are estopped to allege that they were innocent, or that they were misled. On the contrary they are presumed to have acquiesced in the use which was made of their property by the creamery company; and to have consented to the method of doing business with their property and handling their funds through the national bank in whatever manner the findings of the state court may have determined the business was conducted and their funds were handled. And having acquiesced they are estopped now to claim that as a matter of law the bank and not the creamery is responsible to them. This national bank, because of their knowledge of what was being done and their consent to the manner in which it was done, cannot be held in equity or good conscience to respond to their claim for the loss of their property. They must look to the creamery company which they trusted and which they consented might handle the proceeds of the milk through the bank in what must under the circumstances of their notice and knowledge, be held to be the ordinary transaction of a banking business for the creamery, such as the bank had done prior to the time the assignment was made to Brown. Citation of authorities would not seem to be required to establish the estoppel. If the milk patrons must suffer by reason of what has been done, our answer is that the loss should fall upon them instead of the creditors and stockholders of this national bank. The latter are innocent; and even if the milk patrons are innocent, they had notice and they were negligent and they enabled this alleged fraud, if it be called a fraud, to

be perpetrated. And in the language of this court in *Friedlander v. Texas Railway*, 130 U. S., 416, 425:

“It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud;”

This brings us to the discussion of the alleged trust which followed milk into cream, and butter and money.

IV.

THE DECISION OF THE STATE COURT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS; BECAUSE THE ARRANGEMENT BETWEEN THE CREAMERY AND THE MILK PATRONS CREATED NO TRUST OR EQUITABLE CLAIM TO THE PROPERTY OR ITS PROCEEDS AND NEITHER THE CREAMERY NOR THE BANK IF THE LATTER BE HELD TO HAVE BEEN ENGAGED IN OPERATING THE CREAMERY WAS LIABLE TO THE MILK PATRONS AS TRUSTEE FOR THE PROCEEDS RECEIVED FROM THE SALE OF THE PROPERTY.

The decision is wrong on non-federal grounds for the reasons, that;

A

No trust because mingling and confusion and conversion and loss of identity of property.

Plaintiff's whole case goes upon the theory that the bank was in the position of a factor, or commission man, and acted as the agent of the creamery; that in consequence of this a fiduciary or trust relation existed between the parties. An examination of Findings 12 13 and 14 justifies no such theory. *Before we begin to follow a trust, there must be a trust to follow.*

B

Plaintiffs cases merely decide that when a trust is established trust funds may be followed.

In support of the trust theory the plaintiffs have heretofore cited numerous cases, among them the following:

Union Stock Yards v. Gillespie, 137 U. S. 411.

Nat. Bank v. Ins. Co., 104 U. S. 54.

Boyle v. Northwestern Nat. Bank, 125 Wis. 498.

Now an examination of those cases clearly shows that they have no application to the case at bar because the creamery was not merely a factor, commission man or agent disposing of property on a commission basis, but was rather the *vendee* of the milk furnished by the patrons, and the relation created between the creamery and the patrons was that of debtor and creditor rather than that of trustee and *cestui que trust*. This is clearly apparent from the fact that the milk delivered by one patron was mixed with that delivered by hundreds of others, so that at no time after delivery could the milk delivered by any particular patron be traced. Moreover, the milk was made into butter so that there was a complete change of species. (37)

By this mingling of the milk of the patrons and the change of species in the delivered product, the legal title passed to the creamery. Clearly no one patron had title to the whole and it seems absurd to consider the 287 patrons as bailors—tenants in common—of the whole mass of milk or of butter. The

transaction was one of *sale*, not of *bailment*. And in view of the fact that the patrons knew of the mingling of the milk and its change of species, viz, into butter, it appears conclusively that it must have been the intention of the parties not that the patrons should retain a right in the *res*, that is in the *milk* and the *butter* and the *proceeds* of the sale of the butter, but that they should look rather to a personal contract obligation on the part of the creamery to pay them a certain price for their milk; the price depending upon the selling price of the butter, the amount of milk delivered by each patron and the percentage of butter fat in such milk. If the contract between a patron and the creamery had been that the creamery should pay 3 cents a quart for milk delivered, no one would question but that the relation of *debtor and creditor* was intended to be created rather than a trust relation. The situation is not a whit changed by reason of the fact that the patron was to be paid out of the proceeds of the sale of butter and that the amount due him was not a fixed amount but to be contingent on the selling price of the butter fat in his milk.

C

It was sale and not bailment.

No trust relation was created, since the whole basis of a trust is a *res*, a thing capable at all times of identification, so that a court of equity can at any time lay hold of the *specific thing* held in trust and compel the trustee to respect the rights of the beneficiary thereto. Here the *res* was gone as soon as the milk of one was mingled with the milk of all, so

that the basis of a trust disappears at once. The relation created was that of *debtor and creditor* and *there never was any trust*.

The three cases above referred to are all cases where a trust did in fact exist and the only question was whether the trust funds could be followed into the bank's coffers. In the case of *Union Stock Yard Bank v. Gillespie* it was held that proceeds of the sale of cattle shipped on consignment could be followed into the coffers of the bank which had notice of the character of the fund deposited. There is no question but that the cattle were held in trust by the factor or that the proceeds were a trust fund which could be followed so long as it was capable of identification. But how different from the case at bar! There was no mixing of the commodity consigned, no work done upon the commodity resulting in a change of *species*, no transfer of legal title; the transaction was clearly a bailment and the existence of a trust right at the start was undisputed. This being so, the decision to the effect that the trust *res* could be followed is without doubt correct both upon principle and upon authority.

But in the case at bar we repeat that there never was any trust created and that therefore the decision in the *Stock Yards* case as to following trust funds has no application whatever.

Bank v. Ins. Co., 104 U. S., 54, is likewise inapplicable for there the *trust* was admitted from the start, it being a case where an insurance agent collected premiums and deposited them in a bank charged with notice of the trust character of the deposit, and the decision being as in the *Stock Yards*

Bank case that the Insurance Co. could as against the bank follow the trust funds.

Again the case of *Boyle v. Bank*, 125 Wis., 498, is of precisely the same kind; that is, the trust was assumed at the outset and the only question was whether the trust funds could be followed into the hands of the bank which was charged with knowledge of the trust character of the money deposited with it. The money deposited was there also the proceeds of goods shipped on consignment to a commission merchant and sold. There was no mingling of goods, no work done by the agent resulting in an entire change in species, no change of legal title; indeed, there was no dispute and could be none that the commission merchant was a *trustee*. But we reiterate that that is not our case. In our case there was a confusion of goods, an entire disappearance of the *res* which could furnish the basis for the alleged trust; work done by the creamery resulting in a complete change of *species*, viz, from milk into butter, and of transfer of the legal title, all showing clearly that the relation created was that of *debtor and creditor* and not a *trust* relation. This being so, the *Boyle* case holding that trust funds capable of identification could be followed has no application whatever to the case at bar.

The Supreme Court of Pennsylvania has passed on this very point. Where farmers delivered milk to a cheese factory and each was credited with the amount of his milk, and all was manufactured together; the company selling all the cheese; each farmer was charged with the expense, and received his share of the proceeds in proportion to the milk

furnished. The interest of one of the patrons in the cheese was sold under execution. It became important to determine the character of the transaction between the patrons and the factory. In deciding the case *Sharswood, J.* said: Page 229,

“The arrangement as proved between the farmers—owners of milk—and the cheese factory, is somewhat peculiar. It certainly did not constitute the parties partners. Nor were the milk owners tenants in common of the cheese when manufactured. No one could have claimed an individual share, and considered the sale by the factory as a conversion. Neither replevin nor trover could have been maintained. By the agreement the milk delivered from time to time by the different customers was thrown into a common mass, made into cheese, sold by the committee of the factory, and then the milk paid for at the price produced by the cheese, allowing ten and a half pounds of milk to one pound of cheese, deducting the cost of manufacturing.

* * * There was evidently no bailment or agency as to the particular milk delivered. By the very terms of the agreement it was to be mixed and confused in part or in whole with other milk indefinitely. It was a sale of the milk to the factory, for which they were to pay at a certain time and in a certain manner.”

Butterfield v. Lathrop, 71 Pa. St., 225, 229-230.

The arrangement of the patrons with the Jenne Creamery Co. was precisely the same as in the Pennsylvania case; the only difference is that in Wisconsin they made butter, in Pennsylvania cheese.

The same rule has been laid down in this Court. One Dittmar, an inventor, entered into a contract with a powder company to manufacture an explosive.

The company agreed to furnish him monthly advancements for paying salaries, etc.; and furnish him all the raw material needed to manufacture the explosive. The advances were to be charged against Dittmar and the parties were to share the profits and losses equally. Dittmar got into debt and the property in his hands was siezed by one Burkhardt. In deciding the case it became necessary to determine the character of the transaction between Dittmar and the powder company and specially to determine whether the goods in Dittmar's hands were in the nature of a bailment. This court by Mr. Justice Hunt laid down the rule to determine that fact in the following language: Page 116.

"It is contended that the question of bailment or not is determined by the fact whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer."

Powder Co. v. Burkhardt, 97 U. S. 110, 116.

Harriman v. Northern Securities Co., 197 U. S. 244. 291-294.

Judged by this rule, the transaction between the Jenne Creamery Co. and the milk patrons was a sale

and not a bailment. The Creamery Co. was not bound to return the milk or anything manufactured from it. The patrons never saw their milk again in any shape or form and never hoped or expected to see it; all they expected to see was the returns of their milk in the form of its money value. It follows from this that there could be no trust relation existing between the patrons and the creamery, but only that of debtor and creditor.

This question of sale and bailment becomes important in cases in bankruptcy where preference is sought, and that is the object of plaintiffs in this case. It came recently before Judge Hook, in the Circuit Court of the Eighth Circuit. The controversy arose over a contract for the reduction of ore. In substance the contract between the parties was this: On the delivery of each car of ore it was numbered, weighed and tested and samples taken therefrom, after which the ore was mixed in a mass with ore shipped by others, and it was then impossible to identify the claimant's ore. It was held that the contract was one of sale and not of bailment and that the claimant was not entitled to a preference in the distribution of the assets of the bankrupt. *Chisholm v. Eagle Ore Sampling Co.*, 144 Fed., 670, 671, 672, 673.

D

Relation that of debtor and creditor, and not trust relation.

In the case at bar it was a physical impossibility to trace or identify the property after it was delivered. All identity of the property was completely lost after its delivery; it was never to be returned

in kind or species and the transaction was a sale pure and simple.

This court held in *Marine Bank v. Fulton Bank*, 2 Wall., 252, that the relation of banker and customer is that of debtor and creditor; and in a later case where a bank had paid a forged check and a second payment was demanded, that "the banker is accountable for the deposits which he receives as a debtor and he agrees to discharge those debts by honoring those checks which the depositors shall offer from time to time to draw on him. *The contract between the parties is a purely legal one and has nothing of the nature of a trust in it.*" [Italics ours.]

Bank of the Republic v. Millard, 10 Wall., 152, 155, 156.

Mr. Justice Davis further declares in this case at page 156, that the relation "of debtor and creditor does not partake of a fiduciary character and the great weight of American authority is to the same effect."

The question of trust or no trust was met at the threshold of this case. A vast and intricate mass of testimony was introduced to establish a trust. By the very nature of the agreement that governed the relation of the parties no trust could be shown.

It was only through the medium of a trust that plaintiffs could hope to establish a preference. It was accomplished wholly in disregard of the plainest principles of law. The whole theory of a trust was a vain imagination, a pursuit of something that never had any existence. The nature of the goods sold and the manner of their complete transforma-

tion thereafter rendered all effort to pursue them and to identify them futile. The identity of the thing was sunk and lost beyond recovery in an indistinguishable mass.

The finding that the patrons were the equitable owners of the property is based on the fallacious theory that the goods were sold on a *del credere* commission. It is clear from the contract that this was impossible. Finding 14 is deduced from Finding 13, which is the substance of the agreement between the parties. (120) The trial court and the Supreme Court of the State alike misconceived the nature of the transaction, misconstrued the agreement between the parties and metamorphosed a simple sale into a mysterious and sinister trust, imputing to a fair and open transaction a design on the part of one of the parties to over-reach and defraud the other.

There was no evidence to show that the creamery used anything but fair means in all of its transactions with the patrons. There was no evidence that the patrons were obliged to deliver their milk to the creamery. It was an open field; the parties dealt at arm's length, and all talk of a fiduciary relation is an instance of the extreme limit to which the human mind will go when it is sent adrift into the region of theory and speculation. (46 47 48 50-51)

On this subject we conclude: There was no trust and all the mass of evidence and findings on the subject become useless lumber. There was no trust, because the nature of the transaction and the agreement between the parties clearly show that no bailment was ever understood or intended to be created

by the parties. The goods were sold as a horse is sold, or any other commodity. The milk was not sold on a *del credere* commission; the transaction was a plain case of bargain and sale; the relation that existed between the creamery and its patrons was that of debtor and creditor, nothing more.

In such case there could be no trust and this court has so declared in *Bank of Republic v. Millard, supra*.

The trust cannot be maintained because it will injure innocent persons.

These plaintiffs have built up an artificial case without any foundation in fact or law.

Because the decision was wrong on this non-federal ground, the way is open to review the judgment of the state court on the federal questions discussed *supra* under subdivisions II and III.

V.

THE DECISION OF THE STATE COURT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS BY REASON OF THE FACT THAT NOTICE TO OFFICERS OR DIRECTORS OF THE BANK WHICH CAME TO THEIR KNOWLEDGE WHILE ACTING AS OFFICERS OF THE CREAMERY CANNOT BE IMPUTED TO THE BANK, BECAUSE THEIR INTEREST IN ONE WAS ADVERSE TO THEIR INTEREST IN THE OTHER.

The state court charges the bank with notice of what its officers and directors knew about the alleged rights of the creamery patrons. But as that non-federal question was also wrongly decided the way is open to consider the federal question even if it should be held that the finding as to notice to the bank presents an obstacle to its determination.

An agreement between D. J. Jenne and E. H. Jenne on one side and John W. Brown on the other,

executed with all the solemnity of a trust deed, signed by both parties in the presence of witnesses and containing such full and explicit covenants on both sides concerning the control and operation of the Jenne Creamery Company, ought not to furnish ground for argument even that the agreement was in fact made by the bank or for the bank, when as a bank it never took any action by its board of directors or any of its officers to adopt or ratify or even recognize it as a contract with or for its benefit (91).

The plaintiffs however advance the claim that the knowledge of this and associated facts acquired by Brown, Steadman and Foster, as directors of the Creamery Company, must be imputed to the Berlin National Bank because those three persons were also officers and directors in the bank.

If the knowledge of these three directors, of the fact that one of their number Brown had undertaken to run the creamery business and pay off its debts and of all his acts in carrying out that purpose, is the knowledge of the bank, how does the knowledge of that fact make the act of Brown the act of the bank?

We need not discuss the question whether notice to an officer or director of a bank is notice to the bank of a matter within the scope of its charter powers, because in this case the alleged act is entirely outside the limits of the corporate power of a national bank.

The notice then if there was any, to the Berlin Bank, could only be concerning a transaction outside and beyond the law of its creation and the purposes

and objects for which a national bank can be formed. Again, knowledge of any fact brought to the attention of the three directors Brown, Steadman and Foster, was acquired by them as directors and officers of the creamery company whose interests were antagonistic to those of the bank.

A

Knowledge of bankrupt creamery and additional loans.

There are several reasons why their position as officers and directors in the creamery company was adverse to that office of trust which they held for the Berlin bank, its stockholders and its creditors. They would naturally conceal from the bank the fact that the creamery was on the verge of financial ruin, because a refusal of credit would have brought the creamery company to an early and untimely end. Balanced as it was on the edge of bankruptcy, that fact must have been concealed from the bank, because within a few weeks the bank loaned \$8,200 to the creamery company, not a dollar of which has been repaid. Besides this there was an overdraft which it is said existed at the time Brown assumed the burden of carrying on the business. Had the bank known this the payment of checks might have been stopped at once.

Brown the cashier was the owner of \$10,400 worth of the capital stock of the bank, and it was a matter of personal and vital interest to him that he should succeed in his efforts to operate the creamery and pay off the debts of Mr. Jenne, his partnership and his creamery (58).

B*Brown guilty of violation bank act as to loan limit.*

But beyond all that, either alone or jointly with other directors of the bank it makes no difference which, Brown had been guilty of a violation of Revised Statutes, Section 5200. That portion of the bank act provides that:

“The total liabilities to any association, of any person or of any company, corporation or firm, for money borrowed, including, in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.”

The capital stock of the Berlin bank was \$50,000 (58). At the time Brown consented to attempt to save the Jenne people, including their creamery company from financial ruin, the partnership of D. J. Jenne & Company was indebted to the bank in the sum of \$5,000, for borrowed money. D. J. Jenne was one of “the several members” of that partnership, and he owed the bank individually \$2,200 (40 58 77). Almost immediately after Brown assumed charge of their affairs he permitted the creamery company to become indebted to the bank in the sum of \$8,200, for borrowed money Finding 27 (126). Brown thus began his management of the Jenne business with Jenne and his partnership, who are counted as one person under Section 5200, owing

\$2,200 in excess of the limit permitted by the bank act, and in a few weeks he had permitted the creamery company to exceed the liabilities authorized by law to the extent of \$3,200, for both of which illegal acts he was responsible. While not a criminal act for which he could be punished, Brown was legally liable to respond in damages to the bank itself, and of course to its stockholders and creditors, for his unlawful conduct.

Witters v. Sowles, 31 Fed. Rep., 1, 3.

Cockrill v. Cooper, 57 U. S. App., 576, 587.

The Bank Charter could also be forfeited R. S. 5239

Gold Min. Co. v. Rocky M Bk 96 U S 240

It was therefore to Brown's interest, as well as that of the other directors of the creamery company, to conceal from the bank any knowledge that he had an agreement with the patrons of the creamery company, under which they should remain the owners of the milk and the butter and the proceeds thereof, and that the deposit account of the company though apparently like any other deposit was to be treated as a trust fund.

Do not these facts present a strong case of adverse interest? His position as cashier and director would have been imperiled by communicating any of these facts in a manner to charge the bank with notice. The personal liability which he had incurred to the bank and its stockholders by permitting two bankrupt customers to exceed the loan limit, was itself enough to seal his lips. The certainty that his efforts to rescue his friends the Jenne people in their

financial distress would have been frustrated, was another monitor which whispered constantly in the ears of this bank cashier, "keep your counsel."

If it be replied that knowledge of one or more of these facts was communicated individually to others or all of the directors of the bank our answer is that only inference from some vague statements is indulged in to establish this, and we rely on the succeeding proposition of law, *infra*, that such knowledge must be communicated to the board of directors acting as a board. The burden of proof rests upon the plaintiffs, and under the circumstances of these hostile interests there can be no presumption that this knowledge which Brown Steadman and Foster may have obtained as officers of the creamery, was communicated to the bank. Not only was it to the interest of Brown and the other directors and officers of the creamery company to conceal the facts, but because that company had continuous dealings with the bank and kept its deposits there, as well as being a large borrower of money, it was to the interest of that corporation to conceal everything that would impair its credit and standing with the bank. Its officers owed it the legal duty not to disclose its affairs to another corporation.

C.

Secret agreement as to preferences of creditors of creamery.

A further significant circumstance must not be lost sight of. Brown had agreed in the trust deed which was never recorded, to pay the claims of all the creditors of the Jenne Creamery Company, the Jenne

partnership, and of Jenne individually (91-92), but no regular assignment under the laws of the state had been made, and there was nothing to prevent one creditor from insisting upon payment in full. This very contingency was feared and provided against in the trust deed in the latter part thereof (94-95), where Brown was given authority if he found it necessary to relieve the trust in a tight place, when pressed by any particular creditor, to pay any claim in full and reimburse himself out of the property conveyed for the money advanced by him for that purpose. Notice to the bank instead of notice individually to a coterie of hand in glove directors might have defeated the whole scheme of the Jenne-Brown trust. Every consideration on that side demanded that Brown conceal the facts from the bank and all the other creditors of the combination.

D.

The law as to adverse interests of directors.

Occupying this adverse position, Brown the bank cashier, was bound by the strongest sort of personal interest, in spite of his disclaimer (59 78), and the principle of law applicable to an official in his situation is correctly stated by Mr. Justice Todd of the Supreme Court of Louisiana speaking of the acts of the president of a bank in *Seixas v. Citizens Bank*, 38 La. Ann. 424, at page 435-436

“where an agent deals in a double capacity for his principal and himself at the same time, and where his acts are evidently designed and intended to benefit or favor the principal to his

own prejudice or that of his creditors, even in such case his knowledge of his condition or other material fact will be regarded as the knowledge of the principal. But where such agent seeks his own personal interest or advantage in the affair, without benefit to his principal, then his knowledge cannot be held to be the knowledge of the principal."

Lord Justice Giffard expressed the principle by saying that the acts of the managing director of a bank who stood in the relation of vendor to that bank could not affect the bank with his notice because "He cannot be taken to have disclosed his own fraud," *Re European Bank* L. R. 5 Chy. App., 358, 362. And Judge Thompson, in his work on corporations, says;

"Where a person is a director in two corporations, which have dealings with each other, his knowledge of the affairs of one of the corporations is not imputable to the other, for the reason that it will not be his duty to disclose to the board of directors of one corporation the affairs of the other, but the contrary."

4 Thompson Corp., Sec. 5214.

The same rule is announced by the Supreme Court of Illinois in *Seaverns v. Presbyterian Hospital*, 173 Ill., 414, 419. That court declares in reference to the rule that knowledge possessed by the agent or executive officer of a corporation, is notice to the corporation itself:

"The general proposition is true, but where an officer is dealing with the corporation in his own interest, opposed to its interest, he is held not to represent it in the transaction so as to charge it with the knowledge he may possess but

which he has not communicated to it and which it does not otherwise possess, of facts derogatory to the title he conveys."

And again in *Higgins v. Lansingh*, 154 Ill., 301, 388, it is said in reference to the president, who conveyed securities with a defective title to his corporation:

"His interest is opposed to theirs and the presumption is not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it."

The claim is urged in this case that because Brown testified that *personally* he and his two stool pigeons had no interest in the Jenne Creamery Company, and that they were only interested for the bank in an effort to get as much salvage as possible out of the liquidation of the affairs of Jenne, that therefore he was acting solely in the interest of the bank. His case does not differ from any other trustee for the benefit of creditors. Such person has no personal interest. How could his interest be greater on behalf of the Berlin National Bank than the other creditors of the Jennes? The only difference that can certainly be discovered in this record is the personal motive he had to conceal from the bank the injurious and ugly facts which have been alluded to. Otherwise Brown owed the same obligation to the bank that he owed to all the other creditors, which was nothing less than to honestly administer and distribute the assets among them *pro rata*. The fact that the bank was interested, for instance, to the extent of \$5,000, and other creditors only \$4,000, did not change the legal status or duties of Brown,

the trustee. His interest as well as his duties are fixed by law. The fact that he may have had no personal or private interest to serve, such as an opportunity to put money into his own pocket, or that he was not a creditor personally of the Jennes, does not enable him to step from under the burden he had assumed and let it fall upon the shoulders of the Berlin National Bank, without the consent of the bank.

Examine this record carefully as may be, it contains nothing on the subject of notice beyond an inference which has been drawn by counsel and by the court below. Banks always consider, and it is the business of bank officers to consider, debts that are owing to them. The principal business of a bank is to establish the relation of creditor and borrower and then keep watch on its debtors and take legitimate steps to secure payment.

The evidence is that there was no change in the relations and the manner of doing business between the creamery company and the bank before and after the transfer to Brown. Whatever Brown did as an officer of the creamery company he had a right to do as an individual. The Supreme Court of Wisconsin has recognized the right of a president of a bank, which was a large creditor of an estate, to undertake the administration of the estate, and the claim of the president in that case for compensation from the bank, in addition to his stated salary, was upheld because his services as administrator were outside of his duties as an officer of the bank. There was an express or implied contract to pay him therefor, which was sustained in *Lowe v. Ring*, 106 Wis., 647, 654-656, in an opinion delivered by Mr. Justice

Winslow, and in *Lowe v. Ring*, 115 Wis., 575, 580, where the opinion was rendered by Mr. Chief Justice Cassoday.

Apply the theory of the state court in the case at bar to the *Ring* case; the president who thought he was acting as administrator of the decedent's estate was not in fact such, but his bank was the administrator. That court on such a theory would have been bound to deny the claim of the president against the bank, because it would have been the bank against the bank.

Our conclusion on this point is that the bank did not and could not have notice of what its officers and directors learned or did while acting as officers and directors of the creamery; therefore the bank was not bound to and did not assume or become bound by their obligations arising out of the operation of the creamery.

If this conclusion of the state court as to notice to the bank, Findings 11, 26, and 34, should be assumed to stand in the way of the consideration of the federal question discussed under subdivisions II and III *supra*, our answer is that the decision was wrong, and therefore no bar to the review of the case on the federal ground.

VI.

THE DECISION OF THE STATE COURT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS BY REASON OF THE FACT THAT NOTICE AND KNOWLEDGE TO CERTAIN DIRECTORS OF THE BANK WHICH CAME TO THEM INDIVIDUALLY AND NOT WHILE ACTING AS A BOARD THAT CERTAIN OTHER DIRECTORS WERE OPERATING THE CREAMERY WAS NOT NOTICE TO THE BANK AND DOES NOT MAKE THE ACT OF THE DIRECTORS THE ACT OF THE BANK.

This finding by the state court that the bank could be bound by the act of its directors and notice to them individually and not while acting as a board if assumed to stand in the way of the review of the federal question cannot prevent its review because this conclusion of the state court was also wrong.

We have already laid a foundation for this branch of the discussion under the preceding subdivision, that Brown and his associates as directors in the creamery company will not be presumed to have communicated or have had their knowledge imputed to the bank.

A.

Individual directors only discussed the cashier's operation of creamery.

The fact that Brown, Foster and Steadman were officers in the creamery company was not concealed. Other facts must have been in the mind of the court, such as some secret statement to individual directors that the bank was doing the business. Brown said, (77):

“The question of continuing the operation of the creamery or ceasing to operate it was not up before the board.”

The bank, according to this statement of the cashier, was not asked to pass upon the question of operating the creamery, and had no voice in the matter.

Brown further says in reference to operating the creamery (77):

“It was talked over by some of the directors individually. We talked of trying to dispose of the property a number of times; made efforts to do that.”

See also 35 77 78 80.

As to the debt which the creamery company then owed to the bank, that was naturally under discussion, and Brown reported to them the condition of affairs, just as Jenne himself, if he had continued to run the creamery, would have reported to the bank as his creditor the condition of affairs, and the prospect of realizing on its securities (77). This matter of the indebtedness was talked over at the directors' meeting, and was the main topic because it was the main business of a bank to discuss the affairs of its debtors. Does the discussion of the affairs of a debtor by the directors of a bank cause the bank to embark in the business of the debtor?

B.

The law as to act of Board of Directors.

There are other portions of the testimony which relate to this subject, but there is nothing more definite which will bring notice to the board of directors of the bank that they as directors of the bank were engaged in the business of running a butter factory, or that Brown had assumed the business for the

bank. And when we consider that under the national bank act, the business of manufacturing and selling butter was entirely outside of its range of operations, there will be no presumption indulged in that the directors received notice or are bound by any notice, which did not come to them while acting as a board of directors, and concerning which there was no deliberate action taken. Judge Thompson lays down the rule that:

“The board of directors to whom the authority to bind the corporation is committed, is not the individual directors, scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together as a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation.”

3 Thompson Corp., Par. 3906.

The record in this case does not show that the assent of any individual director, not even the assent of Brown himself as a director of the bank, was secured to any proposition which committed the bank to the running of the creamery business. One sufficient reason is, no such proposition was made. But if inference may be indulged in, and that appears to be the only method of establishing the assent of the bank directors, *that* is contrary to the further statement of Thompson, in Paragraph 3908, that the assent of a majority even, when not acting and consulting together as a board, is not binding upon the corporation.

This view is supported by 1 Morse on Banks 4th Ed. Par. 124. The decision of the Supreme Court

of Kansas, in *National Bank v. Drake*, 35 Kan., 564, is cited in support of the text. The question arose whether the assent of a majority of the individual members of the board of directors of a national bank, acting separately and singly, was binding on the bank, in reference to the payment of interest to the president on certain certificates of deposit. It appeared that after the interest was paid the directors individually consented to the act of the president. In an opinion by Mr. Justice Johnston the court holds (page 575) that the "action thus taken is not binding on the bank." The case is a well considered authority and proceeded upon the ground that the national bank act requires that the business of the bank shall be exercised by a board of directors, and that they shall act as an organized body. Speaking of this feature of the act Justice Johnson says on page 576:

"It is the board, duly convened and acting as a unit, that is made the representative of the company. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members."

The Supreme Court of Nevada, in *Edwards v. Carson Water Co.*, 21 Nev., 469, quoting from and approving an earlier decision in that court, says, on page 491:

"It cannot, we think, be maintained, that the knowledge obtained unofficially by three of the trustees that Stevenson was engaged in extracting ore from the mine, is sufficient to charge the company with such knowledge. As any number of trustees, acting individually and not as a board cannot act for the corporation, so any information obtained by individual trustees and not communicated to the board, should not, it would seem, become the foundation of a contract binding upon the company. The trustees represent the corporation only when assembled together and acting as a board. Such being the law, how can it be claimed that information communicated to them individually, but not to the board, can be made the foundation of an implied contract on the part of the corporation?"

It may be urged by the plaintiffs that the Berlin bank ratified the act of Brown. There is nothing in *Railway Companies v. Keokuk Bridge Co* 131 U S 371. 381-383. to sustain a ratification. Mere propositions of law in the abstract cannot control the decision in this case. The fact that three directors of the bank were permitted to occupy a similar position in the creamery corporation, does not, *ipso facto*, amount to a ratification by the bank of the operation of the creamery company by those directors as the act of the bank. But it is said that notice to the three directors of the bank was notice to the bank. There is no evidence that Brown, Steadman and Foster directors of the bank, ever decided that the bank was operating the creamery. Notice thereof would have been impossible. But even if given, the authorities hold that that was not notice to the board of directors of the bank such as would bind the bank.

Then as to the argument that the bank's ratifica-

tion of the acts of Brown, Steadman and Foster in running the creamery binds the bank, it may be truly affirmed that if they were running the creamery company, then ratification of their acts would simply confirm the claim which we assert is the fact, that they were operating it as individuals. Without a statement or notice to the bank as a bank, that the bank was running the creamery, it could certainly not ratify any such alleged action.

The decision of the Supreme Court of Wisconsin in *Bank of New London v. Ketcham*, 64 Wis., 7, does not lend any support to the theory of the plaintiffs. In that case a majority of the directors made an informal agreement to take over the assets of a private banking business, which the bank afterwards did take over and retain under the agreement, and the court in an opinion by Mr. Justice Lyon held (p. 11) that the bank had ratified the agreement and was bound by it. But there is no evidence in the case at bar that there ever was any ratification by the directors of the Berlin bank. Also an important distinction is that in the *Ketcham* case the act done was within the power of the bank.

There are numerous cases where officers have done acts which ordinarily should be authorized by the board of directors, but which were not, and where the corporation or the national bank as the case may be, received the benefit and was held to be bound by the act of its officer, but in all those cases the act was within the power of the corporation, not outside of its charter, as would be the act of a national bank in undertaking to operate a butter factory.

In *Western National Bank v. Armstrong*, 152 U.

S., 346, 351, this court held that while the borrowing of money by a national bank was not outside of its power under the bank act, still it was so unusual that the act of the president of the Fidelity Bank of Cincinnati in borrowing a large sum of money from the Western National Bank, in New York, was void, and because the bank had not received the money which had been borrowed, the court held that the plaintiff could not recover.

But our case is distinguished from that and all of these cases, even though it may be claimed that the Berlin bank received some alleged benefit from the act of Brown in running the creamery, by reason of the fact that any such act was wholly outside of the powers conferred upon a national bank by law. And the cases of *First National Bank v. Converse*, 200 U. S., 425, 438, and *Merchants National Bank v. Wehrmann*, 202 U. S., 295, 299, and other cases cited *supra*, under the second subdivision of the argument, show that this court will not permit even the receipt of benefits to operate as a ratification of an act so far beyond the scope of the powers of a national bank as would be an undertaking by which its capital and resources should be embarked in the business of manufacturing and selling butter.

Therefore if the findings of fact that the bank had notice and knowledge that its officers were running the creamery for its benefit, of which findings 8, 10, 11, 30, 33 and 34 are the principal ones are not negatived, because mere conclusions of law, or this conclusion of the state court on this subject be assumed to stand in the way of the review of the federal question, our answer is that it cannot do so because the decision is wrong.

CONCLUSION.

If the bank must be held to have been operating the Jenne Creamery Company, then the bank and these plaintiffs and their assignors were all engaged in a known unlawful and prohibited transaction. The plaintiffs are therefore estopped to recover in any form of action because the alleged lien or trust violates the bank act.

The trust was not established. The transaction between the parties was a sale. The relation between the parties was that of debtor and creditor, and no trust can arise therefrom. The decision of the Supreme Court of the State was not only contrary to the general law but violated the bank act by fixing an unlawful trust on the assets of a national bank.

The equities of the public, and of the bank's *intra vires* creditors and stockholders, are greater than the asserted equities of the plaintiffs; and the former must prevail over the latter.

Therefore the receiver of the Berlin National Bank and the bank itself ask that the decision of the Supreme Court of the state of Wisconsin and of the Circuit Court of Green Lake County, Wisconsin, be reversed with costs, and the complaint of the plaintiffs dismissed.

RUFUS S. SIMMONS.

FRANK J. R. MITCHELL.

S. C. IRVING.

Counsel for Plaintiffs in Error.



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Clerk.

SUPREME COURT OF THE UNITED STATES

No. 144.

OCTOBER TERM, 1909.

GEORGE C. RANKIN, Receiver of The Berlin National Bank,
and THE BERLIN NATIONAL BANK,
Plaintiffs in Error,

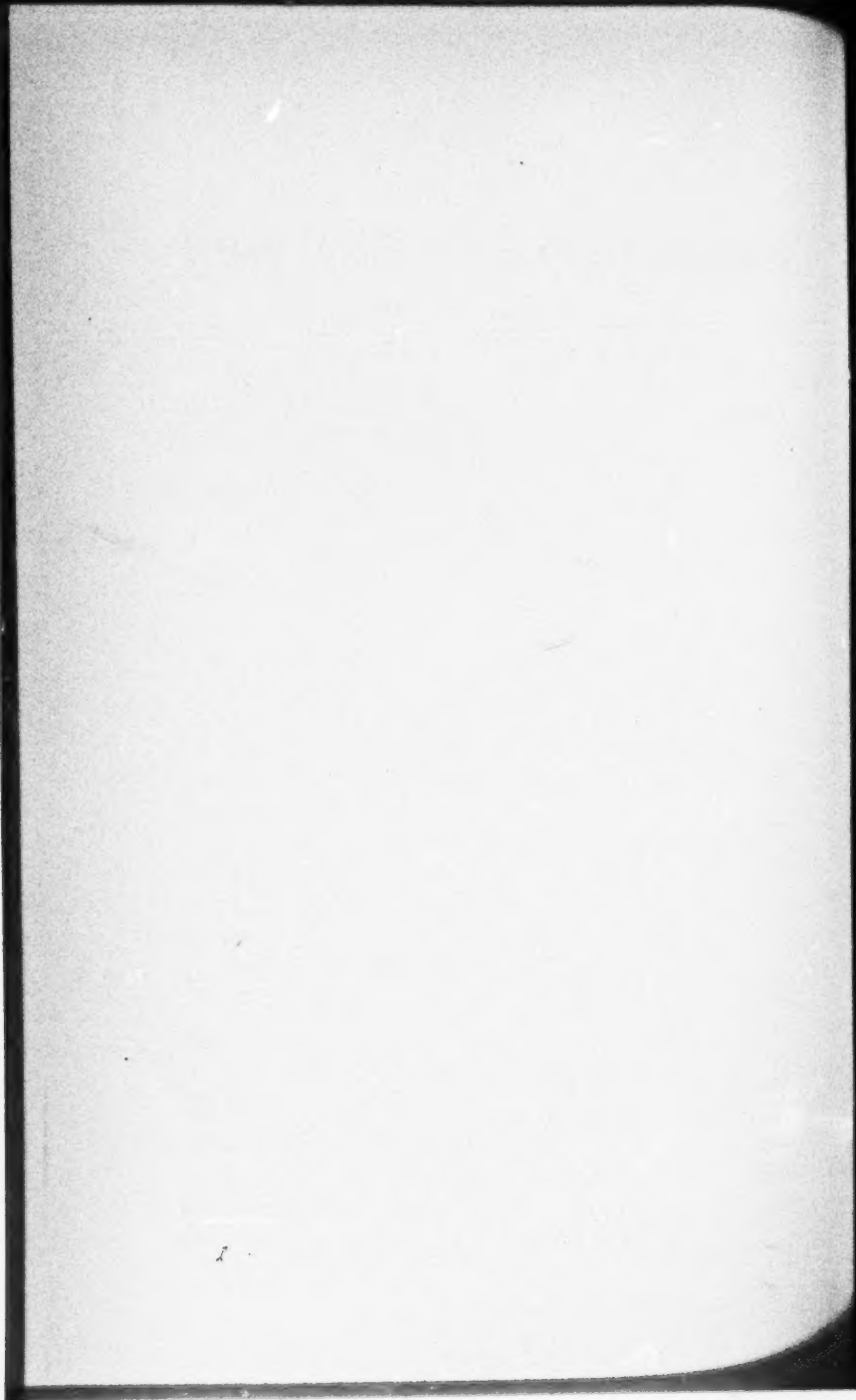
vs.

JOHN EMIGH and O. L. ATKINS,
Defendants in Error.

REPLY BRIEF.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Counsel.

Geo. Hornstein Co., Printer, Chicago.



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REPLY BRIEF.

We never did in this or any other court, and do not now, admit a trust, or a breach of that or any other duty towards these milk patrons. And we deny the statement in the form of a conclusion of counsel (Br. 39) that the position assumed by the receiver warrants the assertion that the innocent persons he represents must submit to the odious charge that they admit a breach of trust and seek to take advantage of their own wrong.

The receiver sets his face like a flint **against any trust in favor of the milk patrons**, or diversion of their funds or breach of a duty to them. But **there was a trust in this case in favor of the lawful creditors** and stockholders of the national bank. And the receiver charges that **the milk patrons committed a breach of that trust!** If any funds are diverted

it will be because these milk patrons have succeeded in defeating the wise provision of the bank act, and in making void the public policy of the act of Congress, if this court finds itself powerless to prevent the consummation of their scheme, whether it originated prior to the failure of the bank or is sought to be accomplished by this suit.

I.

The receiver's position is that the milk patrons had notice and therefore knowledge of everything that was done. What was done, they endorsed. By their concurrence in the method of handling their milk and the product resulting from its manufacture, and the collection of the proceeds; they became creditors of the creamery company. But whatever the relation, it was not a trust relation. The transaction of the bank was then nothing more, because of notice and concurrence of the milk patrons, than the ordinary transaction of banking business between the creamery and the bank.

And the act of the bank, if it really did operate the creamery, and the finding to that effect is not a mere conclusion of law; was an unlawful act, contrary to public policy as expressed in the bank act, and the milk patrons concurred, and therefore the court will not relieve them. Neither will a court of equity assist them "to recover back the property conveyed or money paid," to use the language quoted by Mr. Chief Justice Fuller in the *Harriman* case from the decision in the *Richmond* case. 197 U. S., 296.

The situation in which the milk patrons find themselves was stated in a word by Mr. Justice Holmes while a member of the Supreme Judicial Court of Massachusetts, when he said that;

"if the parties stood on an equal footing neither of them would have a remedy against the other."

Bryant v. Peck, 154 Mass., 460, 461.

This court, in the *Richmond* case, the *Terre Haute* case and the *Harriman* case, has recognized and adopted the doctrine so clearly stated by Mr. Justice Story in his work on Equity Jurisprudence, that where there is no duress or oppression and where public policy would not be promoted by requiring the money or property to be returned and the parties are truly in *pari delicto* a court of equity will not relieve either party.

1 Story's Eq. Juris., 13 Ed., Sec. 298.

If the rule of public policy as to national banks affirmed in *Easton v. Iowa* and in the *Davis* case is to prevail, then **the transaction between these milk patrons and the bank, called by whatever name the milk patrons please, was hostile to that public policy.** And because the milk patrons had notice and concurred in the act they are in *pari delicto*.

As expressed by Mr. Chief Justice Parker the rule is,

"that in all acts, which are unlawful on account of their immorality, **or because they are hostile to public policy**, then the parties to the act are in *pari delicto* and *potior est conditio defendentis*."

Worcester v. Eaton, 11 Mass., 368. 377.

This is followed by Mr. Justice Ames in *Atwood v. Fisk*, 101 Mass., 363. 364. Very significant is the remark by that distinguished judge, that;

“the suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other”

The strong language of the Supreme Court of the state in answer to the claim of the receiver (141) that no authority can be cited to deny the power to “disgorge property” received under a “duty to disgorge,” overlooks the other side of this case.

The public policy of the bank act requires the suppression of the transactions said to have been carried on by the milk patrons and the Berlin bank. That is the purpose of the act of Congress. The purpose of this court is undoubtedly to make that purpose of Congress effective.

To use the words of Mr. Justice Ames the “suppression of illegal contracts” so hostile to the public policy of the bank act, as the operation of a butter factory by a national bank “is far more likely to be accomplished by leaving these milk patrons without remedy.” Public policy would be a dead letter without an effort made to suppress acts in violation of it!

Neither are the circumstances of this case like those in *Spring Co. v. Knowlton*, 103 U. S., 49. 58-59.

There one party to the contract had done nothing towards performance, there was only part performance by the other, and both had abandoned the illegal agreement before it was consummated. **Here**

both parties have carried out the illegal transaction and neither can undo what has been done or make whole the innocent creditors of the bank who have suffered thereby!

The situation is like that presented by Lord Justice Mellish in the case cited by this court in the *Knowlton* case, that:

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done"

Another case cited by this court in support of the foregoing principle is *Lowry v. Bourdieu*, 2 Douglas, 468. Two of the judges concurred with Lord Mansfield in holding that the plaintiff could not recover, and Justice Buller said on p. 471:

"There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation."

How can this court in the language of Mr. Justice Buller restore the lawful creditors of this bank to their original situation?

When the milk patrons began to deliver their milk to this national bank the creamery company owed the bank nothing, or simply an overdraft so small no one could name its amount. At the end of two

years' operation of the butter factory, it owed the bank over \$8,000.

How can the court by relieving the milk patrons of their experiment of allowing a national bank to manufacture their milk into butter, and ~~pay~~ ^{pay} them \$3,000, restore the innocent and lawful creditors of the bank to their original situation?

The case at bar is not cited by *Logan County Bank v. Townsend*, 139 U. S., 67, but by the principles announced in the *Richmond* and the subsequent cases heretofore referred to.

Even in the instances where relief has been granted it is pointed out by Lord Justice Bowen that, "there must be a difficulty in recovering back money paid on account of the well known ground which is shortly expressed in the maxim "*Melior est conditio defendentie*."

James v. Merinothshire, Soc. 1892 1 Ch. 173.
185.

This court has noticed that case and the decision of Chief Justice Parker in the *Worcester* case *supra*. The misleading conclusion that it was more in accordance with justice that money paid upon an illegal consideration may be recovered back, "than by denying the remedy to give effect to the illegal contract," would as declared by Chief Justice Parker "utterly defeat the application of the maxim . . . in *pari delicto* etc". And this court has denied relief in the *Harriman* and other cases, on that principle.

The *Logan County Bank* case *supra* was a case of trust or bailment; this was not. That case was one where the bank was the principal offender, this

is one where each was equally at fault. That was one where the equities were with the plaintiff because he could make the bank whole by a return of the consideration; here it cannot be done.

That case did not involve a transaction in which the capital of a national bank was embarked, through the active and continued co-operation of the claimants, in a speculative commercial venture which resulted in the wrecking of the bank and the loss of the assets in the illegal undertaking; this case does.

That was not a controversy between *intra vires* creditors on the one hand and *ultra vires* creditors on the other; this is such a case, and the public policy involved forbids the court to entertain the claim of the *ultra vires* claimants. To do so would defeat the public policy! To refuse relief would uphold it.

II.

The receiver further denies with emphasis that the transaction presents a case of crime, fraud or tort. If anything was done by the bank beyond the scope of an ordinary banking business, the milk patrons participated in it! If any tort, or fraud, or crime, was perpetrated it was committed not against the milk patrons, but by them upon the innocent *intra vires* creditors! If there was any offense of any sort whatever committed by any person, it was an offense against the public policy of the bank act. And that offense was made possible only by the concurrence and co-operation of the milk patrons with the officers of this national bank. For it the milk patrons are

responsible. By it they have wronged the bank's lawful creditors and offended against the public policy of the bank act. In the face of charges of fraud, crime and tort, it will clear up the situation to point out the real criminals!

The claim that this demand arises out of a tort, fraud or wrong, as it is called by the milk patrons, (Br. 41-45) is disposed of by their notice and knowledge, and by the fact that the transaction was not a tort or fraud in any sense of the term. The cases cited in support of that theory are in a class entirely apart from the transaction here.

Denver v. Harris, 122 U. S., 597, was that of one railway at the muzzle of a shotgun driving another railway off a right of way. *Wright v. Stewart*, 130 Fed., 905, 915-917 and the affirmance by the Court of Appeals in 147 Fed., 321, 328 was the case of a state bank which received stolen goods by conspiring with some thieves to cheat and defraud third persons, and the bank was ordered to return the stolen property!

Such cases as the *Salt Lake City*, 118 U. S., 256, of an attempt by a municipal corporation to evade the payment of the liquor tax because it did not have power to distill and sell whiskey, and *Ches. & Ohio Ry. v. Howard*, 178 U. S., 153, 160, holding a railway liable for a personal injury to a passenger in spite of the fact that the lease of one of the roads over which it carried the passenger was beyond its corporate powers to make; do not seem to be relevant to this discussion.

III.

The decree of the Supreme Court of the state takes money from lawful creditors to pay unlawful claims. It perpetrates a fraud upon innocent persons.

There never was a line or the scratch of a pen in the bank or on its records to indicate the bank was operating the butter factory. And furthermore, **not a syllable of evidence has been brought into this record to establish that the bank operated the creamery. The finding to that effect is based upon inferences and conclusions alone!**

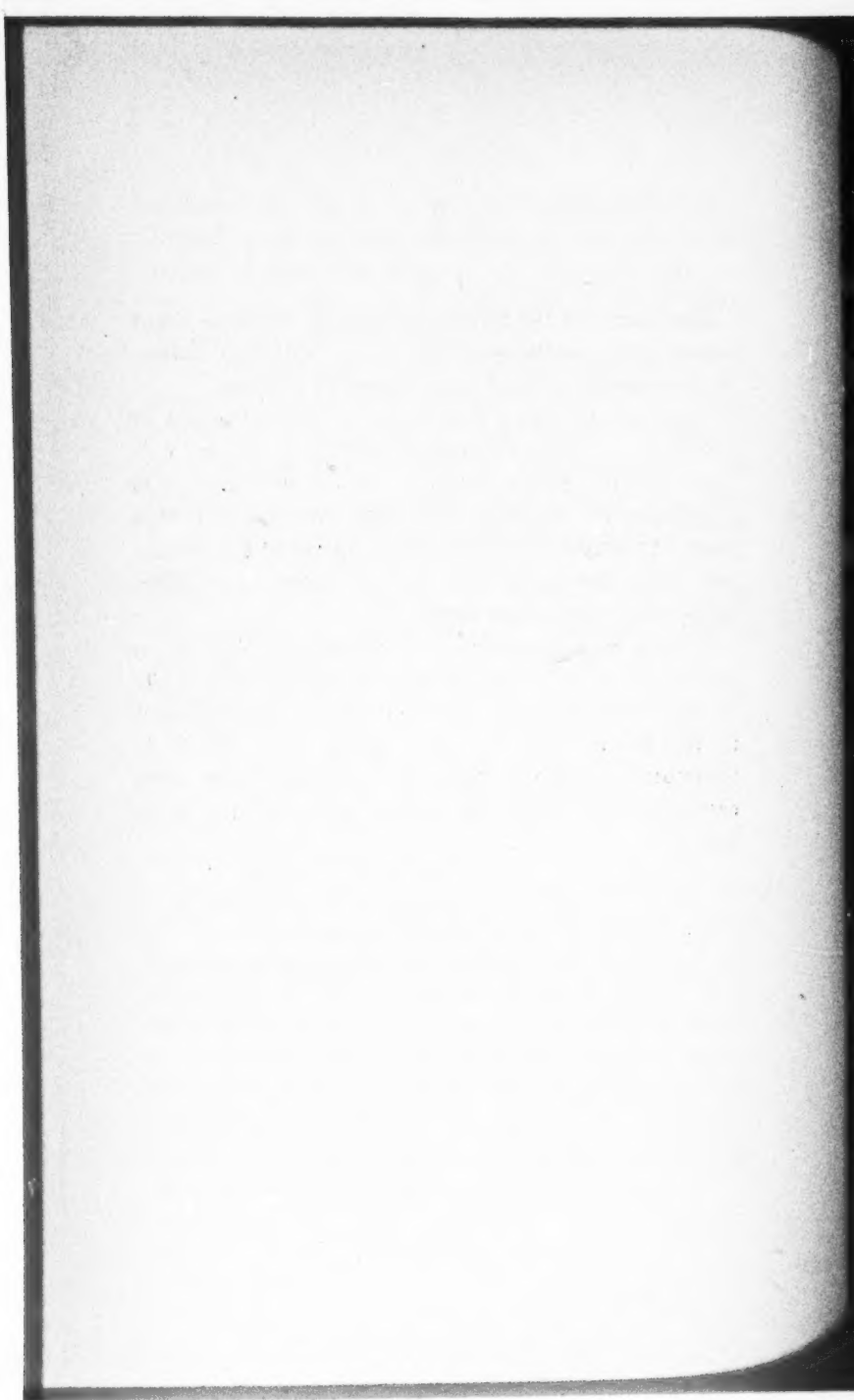
If such an extraordinary conclusion is binding on this court, and the objections we have raised to the relief sought by these milk patrons are not sufficient to bar them, they will succeed in their efforts to **perpetrate a fraud upon the innocent intra vires creditors and defeat the public policy of the bank act.**

RUFUS S. SIMMONS

FRANK J. R. MITCHELL

S. C. IRVING

Counsel for Plaintiffs in Error.



PLANNING AND CONSTRUCTION OF
THE NEW YORK STATE
AND THE NEW YORK CITY
AND THE NEW YORK COUNTY
AND THE NEW YORK CITY
AND THE NEW YORK COUNTY

JOHN EDISON and J. EDISON

President of the State

EDISON TO THE PRESIDENT OF
THE NEW YORK STATE

BRIEF FOR EDISON AND ATLIS

J. C. THOMPSON

Secretary for the State of New York

R. J. KILLEN

Attorney General



In the Supreme Court of the United States

P. R. EARLING, Receiver of the Berlin National Bank
and the Berlin National Bank,

Plaintiffs in Error,

vs.

JOHN EMIGH AND O. L. ATKINS,

Defendants in Error.

No. 144—October Term, 1909.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF WISCONSIN.

BRIEF FOR DEFENDANTS IN ERROR.

This was a suit in equity, brought in the circuit court of Green Lake county, Wisconsin, by Emigh & Atkins, against the plaintiffs in error and others (who were the defendants in the lower court), to trace into their hands trust funds belonging to the plaintiffs and their assignors, and to recover in full all trust funds that could be traced and identified in the hands of the receiver or any other of the defendants, and as to the balance not traced, to have the amount of Emigh and Atkins' claim against the Berlin National Bank for wrongful diversion thereof adjudicated by a court of competent jurisdiction, so as to entitle Emigh and Atkins to a ratable dividend thereon with the other creditors on the distribution of the assets of the Berlin National Bank by its said receiver.

From the decision of the trial court in favor of Emigh and Atkins and against the defendants below, the receiver of the bank and the bank appealed to the supreme court of Wisconsin.

sin, which court, on hearing duly had, affirmed the decision of the lower court, and its opinion will be found in the printed record, on pages 135-141.

As the argument for the plaintiffs in error seems to go upon a wrong theory of the purpose of the action, upon an erroneous theory of the law of the case, and upon a mistaken interpretation of the facts, we believe it essential here to give, as briefly as possible, a statement of the facts as disclosed by the evidence and found by the trial court, and affirmed by the supreme court of Wisconsin, and we may add that in this case there can be little dispute as to the material facts.

STATEMENT OF FACTS.

Originally there were in Green Lake, Waushara and Marquette counties, Wisconsin, several local dairy, cheese, and creamery associations having their own stations, or factories.

Among these were

Terrill Dairyman's Association.
 Black Creek Dairy Association.
 Marion & Mt. Morris Dairy & Cheese Co.
 Spring Lake Dairy & Cheese Co.
 Seneca Cheese Factory Co.
 Neshkoro Dairy Association.
 Red Granite Dairy Association.

Germania Association and a Golden Rod Receiving Station.

Some time prior to March, 1902, D. J. Jenne and E. H. Jenne, co-partners, doing business as D. J. Jenne & Co., entered into written and verbal arrangements, or leases, with the above named local companies, whereby for a small and sometimes nominal rental they acquired the use of the factories, or stations, and in such agreements there was inserted a clause for the benefit of the patrons of such factories, or stations, whereby Jenne & Co. obligated themselves to make butter for the patrons of such factories, for 3½c per pound, whenever butter should sell for 17c per pound, or over, and for 3c per pound, whenever it should sell below 17c per pound. D. J. Jenne & Co. to bear all operating expenses, including trans-

portation. Some of these written agreements are in the record; one of them for illustration is set out in the Printed Transcript.

Twelfth Finding, Printed Record page 119.

Exhibit 3, Printed Record page 89.

Testimony, Printed Record pages 46, 47, 48, 50, 52, 69, 70, 72, 73.

About March 13th, 1902, the Jenne Creamery Company was incorporated and succeeded to and continued the business of D. J. Jenne & Co.

See Bill of Complaint, Printed Record, page 6. Answer, Printed Record, pages 27, 28. First Finding, Printed Record 117.

The leases of D. J. Jenne & Co. were assigned to the Jenne Creamery Co., many of the assignments appearing in the original record.

The Corporation, The Jenne Creamery Company, also renewed the arrangement and made new arrangements of similar kind.

Twelfth and thirteenth findings, Printed Record, pages 121-122.

Testimony, Printed Record, pages 46, 48, 50, 52, 53, 74.

The Jenne Creamery Company also made similar arrangements direct with the patrons, and the nature of the business carried on by the Jenne Creamery Company will appear from the arrangement.

Said agreements with the patrons were to the effect:

"That the said Jenne Creamery Company should take the milk of said patrons and determine the amount of butter fat therein, and make the same into butter in a good and workmanlike manner, and sell the same for said patrons, and after deducting their 3½c or 3c per pound for making, dependent on the price at which said butter sold, to pay the remainder of the proceeds thereof to the said patrons severally, and that in determining the amount of the proceeds to which each patron was entitled, the total proceeds from the sales of butter for each month were to be divided by the number of pounds of butter fat contained in the milk furnished by the patrons from which said butter was made, and the price so ascertained was

to be used in determining the proportion of the proceeds of the sale of said butter belonging to each patron individually, which proceeds were thereupon to be turned over to the several patrons upon the making of such computation."

"That the said patrons who furnished the milk from which the butter was made were at all times, under said arrangements, the beneficial and equitable owners of the same and of the products thereof and of the proceeds derived from the sale of such products."

Findings 13 and 14, Printed Record, page 120.

See also testimony of Brown, Cashier of Berlin National Bank, and after the arrangement in the fall of 1902 (hereinafter referred to), the Secretary and Manager of the Jenne Creamery Company, as the same is found on pp. 80-81, and p. 33, Printed Record.

See also testimony of some of the patrons, Mr. Olsen, p. 46, Mr. Leigh, p. 48, Mr. Terrill, p. 49, Mr. Clappe, p. 51, Mr. Atkins, p. 53, of Printed Record.

In the fall of 1902 the Jennes individually, and as a firm, and the Jenne Creamery Company, the corporation, were in a bad way financially. They were heavy borrowers at the bank and unless aid was obtained were bound to go into bankruptcy. Findings 4, 5 and 6, Printed Record, pp. 118-119.

D. J. Jenne, individually, owed the bank \$2,200.00, D. J. Jenne & Co., the firm, owed the bank \$5,000.00, D. J. Jenne owed individually to others at least \$2,600.00. The Jenne Creamery Company **had an overdraft at the bank** and it had drawn checks, then outstanding to its patrons, against the bank for an amount, as Jenne stated it then, of \$5,000.00; as a matter of fact, the amount overran his estimate.

See Brown's testimony, printed record, p. 77 and pp. 58 and 59. Findings 4 and 5, pp. 117-118.

It is most important to note here that as early as the fall of 1902 the Jenne Creamery Company was overdrawn at the bank and likewise had outstanding, as it then estimated, \$5,000.00 of unpaid checks to its patrons, covering the proceeds from the prior sales of patrons' butter, (these checks over-ran the estimate and it turned out later that the actual

shortage was nearer \$8,000.00). Fourth Finding, Printed Record; 117.

That is, prior to the bank taking hold, through its officers, of the Jenne Creamery Company's affairs, the Jenne Creamery Company had commenced to carry out a course of **wrongfully diverting the patrons' funds** in breach of the trust relation between them, and which **wrongful breach of trust** was, as Brown's testimony shows, brought home at that time to the bank. Findings 4, 5 and 6, Printed Record 117-8. Testimony pp. 58-59.

At that time (the fall of 1902) the Jennes individually, as a firm and as a corporation, were hard pressed, and they thought and talked of going into bankruptcy.

Brown's testimony, Printed Record, pp. 58, 77.

The only assets of the Jennes were an equity in a farm, on a subsequent sale of which less than \$4,000.00 was realized; \$1,400 of which went to the bank, the rest to D. J. Jenne's personal creditors. Brown's testimony, Printed Record, p. 77.

And the assets of the Jenne Creamery Company, being leases of the stations and factories and some separating and butter making machinery therein, which the Jennes, in the fall of 1902, estimated to be worth seven or eight thousand dollars (evidently an owner's valuation) and which same property Mr. Steadman, who became the assignee after the bank's failure and who claims to have investigated the matter and to know concerning the value thereof, puts at, not to exceed \$2,500.

Brown's testimony, pp. 59, 77; Steadman's testimony, Printed Record, p. 45.

D. J. Jenne owed the Berlin National Bank.....	\$ 2,200.00
D. J. Jenne & Co. owed the Berlin National Bank.....	5,000.00
They also owed other parties at least.....	2,600.00
The corporation, Jenne Creamery Co., besides an overdraft at the bank, had outstanding and unpaid patrons' checks, about.....	8,000.00
Total indebtedness	<u>\$17,800.00</u>

Their assets were:

Equity in farm of D. J. Jenne.....	\$ 4,000.00
Jenne Creamery Company's leases and machinery (at their own valuation).....	7,000.00
Total assets	<u>\$11,000.00</u>

As a matter of fact, it is evident that the assets were worth much less.

Fourth finding of fact, Printed Record, p.117, and Brown's testimony, Printed Record, pp. 58, 59, 77, 40.

There was, therefore, good reason for the talk of going into bankruptcy and good reason for the Berlin National Bank (it being a creditor to the extent of \$7,200.00, in addition to the overdraft at the bank, and in addition to the \$8,000.00 of outstanding unpaid checks to patrons), taking a vital interest and an active part in determining what should be done.

These facts as to the financial condition of the Jennes and of the Jenne Creamery Company are of material importance in this case, and of equal importance are the necessary deductions to be derived from them as determining the part taken by the Berlin National Bank in the transactions involving the continuance of the Jenne Creamery Company's business.

Three deductions are in our opinion to be drawn, each of them apparent without argument and verities in this case, to-wit:

FIRST: That the Jenne Creamery Company, with an overdraft at the bank and with \$8,000.00 in outstanding checks, liable to be immediately presented, could continue business at most but a few days **without financial assistance**, to enable it to take care of its outstanding checks and overdraft, and such assistance alone would have been insufficient to have availed for long, without an arrangement of some kind to have paid or delayed the bank's \$7,200.00 claim against the Jennes individually, which otherwise would (with other creditors' claims) have seized upon and taken away from the Jennes, their capital stock in the corporation.

SECOND: It is equally clear that the financial condition of the Jennes was such that no person or corporation would, in view thereof, lend them assistance, as a **business proposi-**

tion, unless it was interested in saving what it could as a creditor:

THIRD: That the bank was **so interested**, and therefore the natural party to be approached in regard to some such arrangement.

Finding 26, Printed Record p. 126.

The affairs of the Jennes being as above stated sometime prior to October 1st, 1902, Mr. J. D. Jenne and Mr. Parrot (a brother-in-law) approached Mr. Brown, the cashier of the Berlin National Bank, and made a statement of their situation at that time.

There were evidently several interviews and conferences between the Jennes and the bank, represented by its cashier, its other officers and its directors. The bank was naturally anxious to save all it could out of the wreck.

That is plainly seen from Mr. Brown's testimony, Printed Record, page 78, which is as follows:

A. WE wanted to get **AS MUCH SALVAGE AS POSSIBLE** out of the property.

Q. This agreement which was made with the Jennes was talked over at different times with the directors, was it not?

A. Prior to that we had **a special conference or two** in which they presented the matter, and the directors thought it best to **take the property and dispose of it for them, and see what salvage we could get out**. It was thought better to do that than to have them go into bankruptcy.

Q. That is, it was thought best for the bank?

A. For all concerned.

Q. It was not your personal interest you had at stake, it was the bank's?

A. Yes.

It is also clearly shown by the evidence that at least at one of these special conferences with Mr. Brown and with the directors, the Jennes made a full statement of their affairs and their financial condition.

See Brown's testimony as to what was evidently the first conference, on pages 58 and 59 of Printed Record, which is as follows:

"Q. The Jennes were somewhat hard pressed at that time, were they not?

A. Why, it appeared so from their statements to us at the time they made the contract or agreement. It was a verbal statement. The statement as I remember it, they asked me to come into the back room, the directors' room, and they, Mr. E. H. Jenne, and also his brother-in-law, Mr. Parrot, and they said to me that they regarded the firm as solvent if they could realize on their assets, able to pay what they owed, but that under their management they were unsuccessful, they were failures in it and they thought it would be better to place the business in the hands of some one in whom they had confidence to liquidate it for them, take up the management of it for them, and if they couldn't do that, they would have to go into bankruptcy, and they asked me if I would undertake the task of doing it for them. I called in the other directors, and they made their verbal statements. That is about what they did.

Q. Do you remember what they were?

A. No, I don't, it is a good while ago, but I remember this, they thought they had out \$5,000.00 in checks on the bank which had not been presented by the patrons of their creameries. They thought the property was worth \$8,000.00, that it would yield a profit of \$2,000.00 a year, and if it was liquidated everybody would get their pay in full. Before that time I had no interest personally with the Jennes.

Q. And their talk was had with you because you represented nearly all of the large creditors, was it?

A. Yes, I suppose so.

Q. That is, they approached you as cashier of the bank?

A. Well, that was one reason, and then they wanted a man whom they had confidence in."

And again on same page:

"Personally I had no interest in the running of this business after making the agreement, except a little work I did as well as I could, whatever was done was done gratuitously. The funds of the Jenne Creamery Company after that were kept at the Berlin National Bank."

And again on page 60 of Printed Record:

"Q. They, (Foster and Steadman) and you (Brown) were anxious to save the bank, isn't that it?

A. Yes, partly.

Q. **Yes, that is to save it for the bank, not for yourselves?**

A. **Yes, we had no personal interest in it."**

And on page 78 of Printed Record:

"Q. And your interest in the matter and connection with it arose from the fact that you were a stockholder and officer of the bank which was involved?

A. We wanted to get as much salvage as possible out of the property."

After these several conferences between the Jennes and Brown, the cashier, and the other officers of the bank, and the bank's directors, a decided change took place in the conduct of affairs, and the following arrangement was made. Findings 7 and 8, Printed Record, p. 118.

The Jennes dropped out of sight. They assigned all the stock in the Jenne Creamery Company to Brown, the cashier, Foster, the president, and Steadman, the assistant cashier, of the Berlin National Bank. These three officers and directors of the bank became the directors and officers of the creamery company. Brown became the secretary and treasurer, Foster the president, and Steadman also held an office in the Jenne Creamery Company and those three held all the outstanding stock of that company.

See Brown's testimony, page 60, of Printed Record.

The stock assigned to Foster and Steadman was assigned directly from the Jennes, not from Brown, as Brown said, "the Jennes assigned over their interest to us and we were operating the business." "Assigned by the Jennes direct to them."

See Brown's testimony, page 60 of Printed Record.

None of the three had any interest in the matter except such as arose from their interest in the bank as stockholders, directors and officers thereof. Brown's testimony, page 60.

The foregoing is, we think, a sufficient statement of the evidence to show clearly the **interest of, participation by, and the full knowledge of**, the bank, its officers and directors, in reference to the arrangement made at that time.

But there is further evidence of the bank's participation in the carrying out of the agreement and the carrying on of the business as well as of its financial interest.

As we have stated before, one of the essential parts of the arrangement and the one **absolutely necessary to make it efficient**, was that **the bank should render financial assistance**.

That is, actively participate in the conduct of the creamery company's affairs.

So we see from exhibit 11, Printed Record, p. 97—the bank book,—that in October, 1902, the bank paid on presentment \$7,677.75 of the checks of the creamery company. Of which there were outstanding about \$8,000 when the arrangement was made. Findings 4 and 10, pp. 117, 118 and 119.

Of course an overdraft on the bank books would not be allowed to stand by the National Bank examiners, or perahps, more correctly, by the comptroller when the examiner reported it to him.

So we find that the bank on October 7, credited the Jenne Creamery Company with \$3,000.00, evidently taking a note. It appearing from Mr. Brown's testimony, pages 78, 79 of Printed Record, that the even \$100 credits on the bank book were evidently notes to the bank. The balance of the overdraft was taken care of by allowing the proceeds of the October, 1902, butter to be **diverted from its true owners**, to the payment of these old overdrafts. Finding 27, Printed Record, p. 126, and Exhibit 11, pp. 96-103.

This is evident because none of the checks paid in October would be to patrons for October shipments, as such distribution of the proceeds under the evidence could not be made until the checks from their eastern customers had been received and collected, which was always well into the next month. Brown's testimony, pages 78-80, 62-63.

That the outstanding checks of the creamery company not only over-ran \$5,000.00, but over-ran \$8,000.00, is quite clearly shown by the fact, as appears from exhibit 11, Printed Record, page 97, that on December 30, 1902, although the bank had meanwhile credited the account \$3,000.00 in October, and on November 28 with \$1,000.00 advancement, and on December 16th with \$4,200.00, that there was on December 30th an over-

draft of \$81.12, with the proceeds of the December butter undistributed. Finding 27, Printed Record, p. 126.

And while discussing this question of overdraft, we may as well state right here that the bank book, exhibit 11, Printed Record, page 96, and Mr. Brown's testimony, pages 78-80, show conclusively that the proceeds derived from the sale of butter each month as they came in were constantly and continuously and **wrongfully diverted from the true owners** and applied to the payment of other parties furnishing milk in earlier months and because of the big deficiency with which they started in October, 1902, they were in addition to **such diversions of funds** compelled to draw on the bank for aid, such overdrafts being shown by the credits on their account, until at the time of the bank's failure, as Mr. Brown testified, the bank had advanced a net total of \$8,000.00 represented by notes, besides a large overdraft against which they attempted to credit October and November (1904 receipts, by a **proposed wrongful misapplication of patrons' funds**. Finding 28, Printed Record, pp. 126-127.

Nor was this system of diverting funds anything in the nature of a mere oversight. On the other hand, it was done deliberately, and with the bank's knowledge and approval.

See Brown's testimony, Printed Record, pages 78-80.

Where he testified as follows: (bottom pp. 79 and 80),

"I know about quite a number of checks being outstanding at certain seasons of the year from the appearance of the account. The books show the amounts, there was a memoranda also of the amount of checks issued, that is, of the patrons' checks. And that was probably figured on, it was thought there would be a certain amount out. That is always known to be a fact * * * *"

"Q. When you took up a note would the matter of taking it up be discussed somewhat with the other directors or officers?

A. It would be mentioned or something like that."

"Q. They understood that there were checks outstanding which would come in, did they not?

A. Yes, this saved interest, perhaps."

Such diversion of funds by the bank and such overdrafts continued right down to the failure, when the bank account in form showed an overdraft of \$825.98, though in fact to this should be added the \$8,000.00 represented in the form of notes and would have been some thousands more, even than that, as shown by the books, except for the wrongful attempt to credit up to the bank the uncollected checks, part of our clients' moneys, for shipments made in October and November, 1904, which were received prior to the closing of the bank. Finding 29, Printed Record, p. 127.

The money itself, however, was collected by and remained in the hands of the correspondent banks until turned over by them to the receiver. Of course, each and every diversion of the patrons' moneys was a **breach of trust**. Finding 35, Printed Record, p. 128, also findings 33 and 34.

To get at the true extent of the bank's interest in the Jenne Creamery Company's affairs as distinct from their interest in the Jennes individually, let us look at the matter from another point of view. In October, 1902, the bank, because of the creamery company's overdraft, was one of a number of those holding claims against the creamery company, the other claimants were the then holders of the outstanding checks, amounting to about \$8,000. The bank by advancing money to take care of these overdrafts came finally, in effect, to be the successor in interest of all the original creditors who existed prior to October, 1902. That is, after the patrons' then outstanding checks had been paid, the bank held and ever since has held all the claims against the Jenne Creamery Company except such as were subsequently incurred incidental to the management of the business and, if the business had been managed in accordance with the rights of the parties and without any **breach of trust**, (so that after October, 1902, the patrons had received the proceeds of their butter as they should have done) the bank would be the only creditor and the **real owner** of the assets of the Jenne Creamery Company.

That is, the bank officers running the Jenne Creamery Company had no interest in it, the Jennes' interest was confessedly wiped out before they surrendered it, and the bank, having acquired the interest of the other original creditors was **virtually and equitably the owner**. After the sale of the

farm the bank was also the only creditor of the Jennes individually and as a firm.

The breaches of trust were for the bank's interest, as the diversion each month of the proceeds of butter reduced the amount which the bank under the arrangement and for its own interest had to put up to meet the overdrafts, and this vital, financial interest of the bank must have been as plain to its officers and directors then, as it is to the disinterested spectator now.

But the testimony as to the active participation of the bank goes farther. See finding 24, Printed Record, p. 124, and findings 28-30-31-32-33 and 34, pp. 126-128.

It appears that the bank's board of directors were active in the management of the creamery company, its affairs were up before the bank's board of directors, reports were made to them of the condition of affairs; at some meetings **this was the sole topic or main topic** considered; the question of continuing the business was talked over among the directors, **they made efforts to dispose of it.** Mr. Foster, the president, Mr. Steadman, the assistant cashier, and Mr. Brown, the cashier, (in addition to the talks at directors' meetings) talked matters over. See Brown's testimony, Printed Record, pp. 77-78.

"The bank was quite heavily interested then, both in the old company and in the new. Once in a while the affairs of the creamery company were up before the board of directors and in a general way I reported to them the condition of affairs, there wasn't any material change except a gradual loss. I reported this to them as often as they called for information. It was not talked over at the directors' meetings more than any other matter, all the questionable accounts were talked over quite often, but usually there are some particular matters that occupied the whole attention of the meeting.

At some meetings this would be the sole topic or main topic. The question of continuing the operation of the Creamery Company or ceasing to operate it was not up before the board, it was talked over by some of the directors individually, we talked of trying to dispose of the property at a number of times, made efforts to do that."

On page 78 of Printed Record:

"Q. In addition to the talks had at the directors' meetings, did you and Mr. Steadman and Mr. Foster talk matters over?

A. Yes, once in a while. They were familiar to some extent with the situation of affairs, not to such a large extent as I was, it was left to me because there was a large amount of clerical work to be done and I understood it."

It further appeared that the Jenne Creamery Company kept no separate books of their cash dealings; that the only books were the bank books. Brown's testimony, Printed Record, 77.

"The Jenne Creamery Company did not keep a separate bank account, did not keep its own books. They had no accounts except all current bills and they had a shipping book, they only dealt in butter, the only books that contained their cash dealings were the bank books, the clerical work done in the city of Berlin was done in the bank."

The directors knew of the overdrafts, the taking of notes therefor and of the outstanding checks. Brown's testimony, Printed Record, 78, 79, 80.

"Q. When you took up a note would the matter of taking it up be discussed somewhat with the other directors or officers.

A. It would be mentioned or something like that.

Q. They understood that there were checks outstanding which would come in, did they not?

A. Yes, this saved interest, perhaps."

Printed Record, 78.

"I don't remember now we often talked about overdrafts when the matter was brought up. Probably the meaning of it is that the company was probably overdrawn and the bank took their note and supplied the money to pay the checks."
"I never had any financial interest in this matter at all, I never charged anything for my services."

Of course, Mr. Brown was an adverse witness, he was one of the bank's officers, a stockholder, and at the time of his examination in the employ of the receiver.

His testimony, however, is amply sufficient to show the

bank's knowledge of and participation in, and financial interest in, the conduct of the Jenne Creamery Company, for two years before it failed, by the bank's own officers and directors, who themselves were without financial interest in the matter and were serving gratuitously **and because of their interest in the bank.**

And "After this arrangement was made, those (\$8,000) outstanding checks were presented and paid in the bank." Brown's testimony, Printed Record, p. 40.

There are two other things which clearly show that the affairs of the Jenne Creamery Company were being run, for and in the interests of, the bank, and that Brown, Steadman and Foster were so carrying on the business because of the interest of the bank **and for it.**

They consist in certain actions of Brown, Steadman and Foster, which "oft times speak louder than words."

The first is this. The instant the bank closed, Brown, Steadman and Foster **quit operating** the creamery company. If they had been carrying it on for the benefit of others or if they had recognized it as an independent corporation, there was no reason for their **at once dropping** the management in the middle of a month without even attempting to complete the month's business. But the evidence shows that they had nothing to do with the operation of the creamery company after the bank closed.

Brown's testimony, pages 62-63, of Printed Record.

Again, there were checks or drafts for butter which came **in after the bank closed.** If they were carrying on the business independently of the bank they should at least have held these funds for the patrons, but because they realized that their connection with the creamery company was only because **of the bank's interest therein,** and that the bank was the **real manager** of the business **through its officers,** they continued as these funds came in **to turn them over to the bank's receiver.**

Brown's testimony, Printed Record, p. 75; Earling's testimony, page 89.

About the time of the making of the arrangement between the bank officers and directors and the Jennes there was a writing drawn up which is in evidence and marked "Exhibit

6." Printed Record, page 91. This writing was signed by the Jennes and Brown and would probably be construed as an **invalid voluntary assignment** for creditors by the Jennes individually and as a partnership, and it included an agreement for the transfer of the corporate stock of the creamery company to Brown and intended evidently to apply all the Jennes assets as well as any earnings of the creamery company to the payment of the Jennes and the creamery company's indebtedness.

The bank evidently wanted this so that through its cashier it could hold the property in which it was so largely interested **as against the Jennes**, and perhaps it would have been legally sufficient for that purpose.

However, as to third parties, it was of course void, being a voluntary assignment not made or filed in accordance with the laws of Wisconsin, Chap. 80, R. S. Wis., and containing a provision allowing the bank's cashier, Brown, to **prefer and pay in full** any particular creditor he desired.

This writing is probably of little importance in this case, inasmuch as the bank officers who ran the creamery company for the bank admit they had no interest in the corporation and it is not disputed that after the arrangement of 1902 that the corporation was run and kept up only **as a matter of form**. Brown's testimony, Printed Record, pages 59-60.

Perhaps the most important aid to be derived from this instrument is the admission of the Jennes therein in paragraph 4 of first page, of **their inability to pay their indebtedness** and the general confirmation contained therein that the Jennes were anxious to get out from under and turn their property over to be run in such manner as their heaviest creditor (the bank) should desire.

Of course **this agreement does not contain by any means the full understanding then arrived at.**

In the first place the schedules of property covered, referred to in the writing, seem never to have been attached to it.

Again, the writing would have it that the stock of the creamery company was to have been transferred to Brown, whereas the fact was as disclosed by the testimony above quoted, it was to be and was transferred by the Jennes direct to the three officers of the bank.

Again the agreement does not attempt to cover or disclose for whose benefit it was made, though as a matter of fact the bank was and from the very nature of the case must have been the **main party** to it.

For another thing the writing omits any mention of **protection by the bank of the outstanding \$8,000 of checks** of the corporation, which must have been the main and important matter under consideration.

The agreement is entirely confirmatory of the other evidence that it was the intention of everybody and the understanding that the Jenne Creamery Company should be **in form continued by nominal party or parties**, of course in the real interest of the bank.

The bank was the party most heavily interested. Through its officers and directors it **participated** in the whole understanding and arrangement and it **participated** in the carrying out of the agreement and **furnished the funds therefor** and would, if it had been successful, **have profited** thereby.

The whole evidence discloses the bank's participation in and knowledge of the breaches of trust in the wrongful use of the patrons' money from time to time, and also clearly shows **want of good faith and fraud**. Its concealment for two years of the **actual condition of affairs** may be fairly said to be one of the **direct causes** which operated to bring about any loss which our clients may sustain.

Exhibit 6 was not recorded. This deprived the patrons of the legal notice which they would otherwise have had of the insolvent condition of the Jennes and their company.

Had they had such notice they would have dealt with it no longer.

Not only was the true condition concealed, but in addition Metcalf, the foreman and manager, went about renewing and making contracts and explaining to the patrons and the local creamery associations that Steadman, Foster, Brown and himself now owned the company and that it was better off than ever. Oleson's testimony, Printed Record, pp. 46-48; Terrill's testimony, p. 50; Clappe's testimony, pp. 52-56. Finding 32, p. 128.

Metcalf had authority to make arrangements with the

local creamery associations both for the lease of their creameries and for the benefit of their patrons. In fact, we find that "Exhibit V," Printed Record, p. 72, one of the leases, which Mr. Brown testified they operated under, was signed for the Jenne Creamery Company by Frank Metcalf, "mang'r."

These false representations by Metcalf, made to induce people to do business with them, must be charged up to the interests which were in reality running the creamery company and they are of course legally responsible therefor.

The patrons were never told of the true situation, as Brown testifies: "I do not think there was anything said, he gave no instructions." Testimony, Printed Record, p. 61.

The concealment of the true situation, the carrying on of the business in a false form was a breach of trust by those handling the patron's milk and butter and the proceeds thereof and one which of course ultimately led to the present unfortunate situation under which the patrons who in good faith delivered their milk have been thus far kept from receiving the proceeds thereof.

It is apparent that the plan was to induce the patrons to deliver milk when they otherwise would not have done so.

It was all done for the supposed interest of the bank; the bank had an interest in the carrying on of the deceit. To sum it up, IT WAS THE BANK, THROUGH ITS OFFICERS, WHICH IN REALITY CARRIED ON THE BUSINESS, ABSORBED THE PROCEEDS, SO FAR AS IT COULD, AND HAD IT BEEN A FINANCIAL SUCCESS, WOULD HAVE REALIZED THE MAIN BENEFIT IN THE PAYMENT OF ITS CLAIMS.

Findings 10 and 11, Printed Record, p. 119.

Under the law, the bank must be charged with full knowledge and participation in the management of the trust property of our clients and liable for any breach of trust in the management thereof.

There is no dispute as to the facts in regard to the patrons' claims, which have been assigned to Emigh and Atkins. The patrons were to deliver milk, the Jenne Creamery Company and those conducting it were to make it into good butter, sell it and after deducting a certain amount per pound as their

commission, were to distribute the proceeds derived from the sale among the several patrons in proportion to the amount furnished by each.

Findings 12 to 17 and 37, Printed Record, pp. 119-121 and 129.

The assignment to Emigh and Atkins cover the funds, in whomsoever's hands the same might be found, and the form of the assignment was an assignment of the right to the fund. Assignments (omitted from Printed Record) will be found in Original, pp. 264, et seq.

FACTS AS TO NATURE AND AMOUNT OF CLAIM AS ASSIGNEES OF THE DIFFERENT PATRONS.

As shown by the statements on the envelopes offered (prepared by Miss Steadman from the books), and the computations of Mr. Brown, being Exhibits 19 to 29 inclusive, (Original Record, pages 214-233), and also Exhibit 10, (Original Record, page 178), the shipping book, and the milk sheets, and as shown more explicitly by the computation offered in evidence, (being Exhibits 32 and 33, Printed Record, 108-113), it appears that, including butter sold patrons, there was made in October, 1904, a total of 11,635 2-3 pounds of butter, for which \$2,450.00 was received. Deducting the 3½ cents per pound for making, leaves \$2,042.75 to be apportioned among the patrons for the 10,724.4 pounds of butter-fat in the milk furnished that month, as shown by the statements, and entitled each patron for each pound of butter-fat to 19 cents.

The total amount that should have been distributed to the patrons (who assigned to Emigh and Atkins) for the October shipments, after deducting the butter received by them at 21.1 cents per pound, (some of them took butter for their own use and were charged up average sale price) being the average price for which butter was sold that month, would leave the net amount still to be distributed among the patrons for October \$1,851.33. Finding 15, Printed Record, p. 120.

The total amount of butter made in November, 1904, up to the close of the bank, including that received by patrons, was 3,508¼ pounds, for which there was received, charging the patrons the average price of 25 cents, \$869.44; and deducting

the 3½ cents a pound for making, leaves \$746.65 to be apportioned to the 3,830 pounds of butter-fat during that month, as shown by the statement, and each patron would be entitled to receive 19.4 cents per pound for each pound of butter-fat in his milk, as shown by the test during the first half of November, and the total amount still remaining to be distributed to the November patrons, after deducting for the butter received by different patrons at 25 cents per pound, would be \$669.13. Finding 16, Printed Record, 121.

In addition to the plaintiffs below being assignees of the patrons who did not receive the proceeds of the October and November, 1904, butter, they were also assignees of certain patrons who had not received their share for the butter made in earlier months, ranging from June to September, 1904.

These patrons had received checks, which on account of the failure of the bank, were not paid. These checks were offered in evidence as well as a list of the same showing the aggregate amount, which was \$406.97. See exhibits 12 to 17. (These being the checks themselves) and Exhibit 18 (the list of checks), Printed Record, pages 103 and 104. Finding 25, Printed Record, 125.

Mr. Brown testified that these "checks for each patron purported to evidence the proportion of the amount of the proceeds, which had belonged to the party named therein." That "Exhibit 12-A to 12-H and Exhibits 13-14-15-16 and 17 are checks issued to patrons for their proportionate share of the proceeds of butter made and sold during the month preceding their date. Those checks show the proportionate part of the proceeds of butter collected that belonged to these different parties for the month preceding the date of each check. I think none of those checks have been paid. They do not appear to have been paid. So far as I know the parties therein named have never received the proportion of the proceeds of the butter represented by those checks." Brown's testimony, Printed Record, page 32. Finding 25, Printed Record, 125.

THE FACTS AS TO THE TRACING OF THE TRUST FUNDS.

The \$406.97 belonging to Emigh & Atkins, as assignees of certain patrons who furnished milk in the months from June

to September (both inclusive) 1904, were wrongfully diverted from the true owners prior to the early part of October, 1904, and the plaintiffs were unable to trace such funds, as being still intact, in the hands of the Berlin National Bank, or its receiver.

Findings 24, 25, pp. 124, 125; Conclusion V., p. 130.

As to the \$1,851.33, the proceeds of the October, 1904, butter belonging to the patrons, and the \$669.13 to be distributed to the patrons of November butter prior to the bank's failure on Nov. 17, the plaintiffs below as assignees of such patrons, were able to trace all of these funds into the hands of the receiver, and to show that the same came into and remained in the hands of the receiver at the time of the commencement of this suit.

Findings 17-18-19-20-21-22-23, Printed Record, pp. 121-124.

These findings are clearly supported by the evidence; were not questioned by the appellants below in their brief and the testimony in regard thereto will be found mainly in the Printed Record, pages 63, 64, 74-76, 84-89, 96-103, 34, 38-40, 45. Exhibit 10, the sales book, Original Record 178, and Exhibit 11, bank book, Printed Record, 96-103.

The long and short of it is, that a considerable part of the funds received from the sale of October and November butter came **directly into the hands of the receiver**, after the failure of the bank, and the balance of the proceeds of the sale of butter for said months came to the bank in the form of checks and drafts on Eastern banks, and these checks and drafts were by the bank forwarded to New York, Milwaukee and Chicago correspondents, **for collection**, and they collected the same; kept the **proceeds** in their hands, where it was shown they remained until after the Berlin National Bank failed, when they were turned over by the correspondent banks to the receiver. Each of the correspondent banks at all times, after it received the proceeds of the collection of these checks and drafts for butter, had in its hands more funds than the amount thereof, belonging to the credit of the bank, and these balances were turned over to the receiver.

That these funds of the patrons were turned over and delivered to the receiver and were at the time of the commence-

ment of this action in his hands, is directly and positively admitted by the pleadings. It was alleged in the complaint, subdivision 57 (Printed Record, page 26). This subdivision of the complaint was expressly admitted to be true by the answer of the receiver, (Printed Record, page 27) and by the answer of the bank, (Printed Record, page 28).

So that there is, on the evidence, on the pleadings, and on the findings, no question but what the receiver had and received these trust funds belonging to the plaintiffs below. It is also probably true that in accordance with the practice in these cases, that these funds were afterwards deposited with the Treasurer of the United States. Earling's testimony, pp. 45-46.

GENERAL STATEMENT.

We call the court's attention to the fact that the findings in this case (Printed Record, pages 117-130) cover very clearly all the issues in the case, and we believe will be found to be supported not only by the preponderance of the credible evidence, but by all of the credible evidence.

Neither the receiver nor the bank in the Supreme Court of Wisconsin seriously questioned any of the findings of fact.

We call attention here to the circumstance that the evidence of the participation of the bank's Board of Directors and officers in the running and handling of the Jenne Creamery Company's affairs and the evidence of its participation in the wrongful diversion of the patrons' money, and as to the handling of the patrons' funds is principally the evidence dragged out of the officers of the bank and the receiver, himself. That it was reluctantly given is manifest. See Earling's testimony, Printed Record, pp. 81-84.

We call attention also to the fact that the plaintiffs below (defendants in error, here) desiring to show, by the Bank's minute book, the action of the Bank directors in regard to the creamery company's business, notified the receiver's attorney to produce the Bank's Record Books and Minute Book. Printed Record, p. 44.

No Minute Books, Record Books, or anything else was furnished in response to this notice, nor were any of its other directors or officers offered as witnesses. It seems to us, there-

fore, a fair assumption that the Book of Records of the proceedings of the Board of Directors and the testimony of the others connected with the bank would have been at least as favorable to the defendants in error, as the testimony of Brown and Earling. For if it were not so, the plaintiffs in error would have availed themselves of their right to use the records and put on the witnesses.

FINDINGS OF FACT.

The findings of fact in this case were made by the judge of the trial court after careful and painstaking study. The patience and industry of the trial judge in his consideration of all the evidence merited the endorsement and approval which it received at the hands of the supreme court of Wisconsin.

Emigh v. Earling, 134 Wis. 565, 571, 574.

The findings were approved and affirmed by the state supreme court.

"The principle that a general affirmance of a judgment based upon the findings of fact made by the trial court leaves those findings intact unless they are specifically set aside in the decision or opinion," is the established doctrine in Wisconsin.

Town of Fulton v. Pomeroy, 111 Wis. 663, 670.

So that in this case, the findings of fact become and are the findings of both the trial and the supreme court.

The assignments of error here (transcript of record, page 145), do not, as we understand them, challenge any of the facts found.

We therefore understand that the facts, as found, are a verity on this hearing.

Egan v. Hart, 165 U. S. 188.

Chrisman v. Miller, 197 U. S. 313, 319.

Thomas v. Texas, 212 U. S. 278

Mammouth Mining Co. vs. Grand Central Mining Co.,
213 U. S. 72.

Whitcomb v. White, 214 U. S. 15.

Gray v. Noholo, 214 U. S. 108.

Reavis v. Fianza, U. S. S. C. advance sheets (present term), No. 1, page 1.

With this in mind considerable of the record was omitted in printing.

Printed Record, pp. 146-148.

RESULT OF TRIALS BELOW.

The judgment of the trial court will be found in the Printed Record, pages 29-31.

It allows the defendants in error (who were plaintiffs below) to reclaim and have from the receiver the \$2,520.46, the proceeds of patrons' butter for October and November, 1904, which amount as shown by the evidence, findings and pleadings, came into the receiver's hands.

It also allows them to participate as other creditors in the dividends paid by the receiver of the bank for the amount of \$406.97, which represented the funds of patrons which were diverted in the several months immediately prior to October, 1904, and which funds were not traced into the receiver's hands, but for which the bank was liable for having knowingly and actively participated in the wrongful diversion thereof, and the same was therefore allowed as a general claim against the bank.

Judgment also allowed costs.

In default of carrying out the judgment within thirty days, the receiver (in accordance with the practice in such cases), was directed to certify the judgment to the comptroller of the currency for his guidance.

BRIEF OF ARGUMENT.

The right of the defendants in error to recover in this suit, in the manner provided by the judgment of the lower court herein, is well settled and rests upon clearly established rules of law, to which we desire to briefly refer.

I.

It is well settled that, WHERE A FACTOR, COMMISSION MAN OR AGENT DISPOSES OF THE PROPERTY OF THIRD PARTIES ON A COMMISSION BASIS AND COLLECTS THE MONEY FOR SUCH THIRD PARTIES AND DEPOSITS THE SAME IN A BANK FOR ULTIMATE DISTRIBUTION TO THE TRUE OWNERS; THAT

(a) THE RELATION BETWEEN SUCH MIDDLEMAN AND THOSE FOR WHOM HE IS ACTING IS A FIDUCIARY OR TRUST RELATION.

(b) THAT THE THIRD PARTIES ARE THE BENEFICIAL OR EQUITABLE OWNERS OF SUCH FUND.

(c) THAT THE BENEFICIAL OR EQUITABLE OWNERS OF SUCH FUNDS MAY BY AN ACTION IN EQUITY, ESTABLISH THEIR TITLE AND RECOVER POSSESSION OF SUCH FUNDS IN FULL IN WHOMSOEVER'S HANDS THE SAME MAY BE FOUND AND IDENTIFIED WITHIN THE EQUITABLE RULE OF IDENTIFICATION.

(d) THAT A BANK OR DEPOSITARY, IF IT HAVE NOTICE OF THE EQUITABLE OWNERSHIP OF THE FUNDS, CANNOT APPLY THE SAME TO THE PAYMENT OF AN OVERDRAFT OR NOTE OF THE BROKER, FACTOR OR AGENT, EVEN THOUGH SUCH DEPOSIT IS KEPT IN THE INDIVIDUAL NAME OF SUCH BROKER.

The foregoing propositions have been settled by this court.

Union Stock Yards Bank vs. Gillespie, 137 U. S. 411.

National Bank vs. Insurance Company, 104 U. S. 54.

Boyle vs. Northwestern National Bank, 125 Wis. 498.

Emigh vs. Earling, 134 Wis. 565.

Under the authorities, the bank and its receiver are liable to Emigh and Atkins for the return in full of all funds which can be traced into and identified in its or his hands.

It appeared from the evidence and the court below found (as more specifically pointed out in our opening statement) that the defendants in error as assignees of the October, 1904, patrons owned a fund of \$1,851.33, which had not been distributed when the bank failed, and owned a like fund, as assignees of the November patrons, of \$669.13. Findings 15 and 16, pages 120-121, Printed Record.

And a large part of this fund came directly into the receiver's hands after the bank failed. Findings 17 and 18, page 121, Printed Record.

All of the other proceeds, (in the form of checks and drafts from Eastern purchasers), of October and November (1904) butter, came into the hands of the bank before its failure; were

sent by it **for collection** to its correspondent banks in New York, Chicago and Milwaukee; were there collected and the proceeds of such collections remained in the hands of such correspondent banks until after the Berlin bank failed, when the proceeds of those checks were turned over by such correspondent banks to the receiver. Findings 17-19-20-21-22-23, pages 121-124. Conclusions of Law, 1, 2, 3 and 4, pages 129-130, Printed Record.

The bank knew that the proceeds of the butter belonged to the patrons, and held the same in trust for them; and the bank's officers and directors were then running and conducting the business of the Jenne Creamery Company. Finding 24, page 124, Printed Record.

The bank **in form** attempted to credit up the checks and drafts against the overdrafts of the Jenne Creamery Company. Findings 28 and 29, pages 126-127, Printed Case.

In spite of the **wrongful attempt** to credit up, against the Jenne Creamery Company's overdrafts, the patrons' October and November moneys, aggregating \$2,520.46, there was when the bank failed, an apparent overdraft of \$825.98, so that at the time of these transactions in October and November, 1904, there was without such attempted credits of the patrons' moneys to the Jenne Creamery Company's account, an overdraft on the Jenne Creamery Company's account of some \$3,000.00.

"Such book entries (the attempted crediting of the patron's moneys to the Jenne Creamery Company's account) did not affect the actual status of the transaction, or give the bank any right or claim to the proceeds of the October and November butter; nor in any wise affect the right of the October and November patrons to have and receive the same, and such book entries were made before the checks or drafts representing the proceeds of the butter shipments were collected, or the moneys thereon received by the bank, or by its correspondent banks." Last paragraph of finding 29, Printed Record, page 127.

Mere bookkeeping cannot change the rights of the parties.

The Supreme Court of Illinois said in *American Exchange Bank against Mining Company*, 165 Ill. 103, "Mere bank entries crediting items up to the account could not affect the true situation, and the notice to the bank for the purpose for which

the fund was to be used was such as to prevent any other use being made of it and rendered the bank liable."

The Supreme Court of Wisconsin said in Boyle against Bank, 125 Wis. 498-509, that the charging of the items to the account, and the issuing of the cashier's check and crediting the amount was only in effect a method of book-keeping and was improper and ineffectual and did not in any wise affect the fund in the bank to the credit of said account.

"That right cannot be defeated by a mere system of credits. It is only when the identity of the fund has been lost, when it has been dissipated or so confounded and mixed up with other funds that it cannot be traced, that it cannot be reclaimed."

Hyland vs. Roe, 111 Wis. 361-368.

Con Mat v. Armstrong 148 N.S. 57-58.
In short, there was \$2,520.46 from the proceeds of the sale of October and November, which at the time the bank failed (November 17th, 1904) had not been distributed to its owners. A part of this fund had already been received by the bank in the form of checks and drafts on Eastern concerns, and had been forwarded to the Berlin bank's correspondents for collection. Some of it was collected by the correspondent banks before the failure, some afterwards, but all of such proceeds, whether collected before or after the bank's failure were still in the hands of the correspondent banks and were by them turned over directly to the receiver and increased the funds in his hands. The checks and drafts for October and November butler, which did not come in until after the bank failed, went directly to the receiver and were collected by him.

This fund was a trust fund and belonged equitably to the patrons and now belongs to their assignees, the defendants in error (plaintiffs below), to whom the trial court has awarded it, and this is the fund described in findings 15 and 16, pages 120-121, and also in findings 18-19-20-21-22 and 23, pages 121-124, and covered by the judgment, pages 29-31. Conclusions of Law, 129-130, Printed Record.

II.

There were some funds, to-wit: The \$406.97 represented by some of the May, June, August, July and September checks, which it was impossible to trace and identify, into the receiv-

er's hands, and the liability of the bank and its receiver for such funds depends upon other well settled propositions, and one of them is:

A.

THAT WHERE A THIRD PARTY KNOWINGLY PARTICIPATES IN THE HANDLING OF THE TRUST OR THE DIVERSION OF TRUST FUNDS, IT IS LIABLE PERSONALLY TO THE CESTUI QUE TRUST AND BECOMES IN FACT A TRUSTEE DE SON TORT AND LIABLE TO THE SAME EXTENT AS THE ORIGINAL TRUSTEE.

In such case where the bank has gone into a receiver's hands, the claim against the bank for funds which could not be identified in the receiver's hands, would be entitled only to the same dividend as the claims of other creditors.

"THERE CAN BE NO DISPUTE THAT AS A GENERAL PRINCIPLE, ALL PERSONS WHO KNOWINGLY PARTICIPATED OR AIDED IN COMMITTING A BREACH OF TRUST ARE RESPONSIBLE FOR THE MONEY, AND MAY BE COMPELLED TO REPLACE THE FUND WHICH THEY HAVE BEEN INSTRUMENTAL IN DIVERTING."

Duckett vs. Machines Bank, 86 Md. 403.

"By the well settled doctrines of equity a constructive trust arises whenever one party had obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it."

"Whenever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee not in the course of executing and carrying into effect the terms of the express trust, **or devolves from a trustee to a third party who is a mere volunteer**, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor or **other voluntary transferee**, or such purchaser with notice, acquires and holds the property, subject to the same trust which before existed **and becomes himself a trustee for the original beneficiary**. And it impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active,

and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is in fact impressed."

Pomeroy's Equity Jurisprudence, sec. 1047-1048, Vol. 2.

"Every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust."

"This broad conception of breach of trust and the liabilities created thereby are not confined to the trustees regularly and legally appointed. They extend to all persons who are acting trustees, or who intermeddle with trust property."

Pomeroy's Equity Jurisprudence, sec. 1079, Vol. 2, page 656.

"It is a universal rule that if a man purchase his property of a trustee with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased.

Having once taken, with notice of the trust, he is a trustee in law."

Perry on Trusts, sec. 217.

"A person may become a trustee by construction, by intermeddling with and assuming the management of property without authority. Such persons are trustees de son tort."

Perry on Trusts, sec. 245.

"During the possession and management of such constructive trustees, they are subject to the same rules and remedies as other trustees, and they cannot avoid their liability by showing that they were not in fact trustees * * * * Of course such unauthorized persons will always be liable to be deprived of the possession at the suit of those beneficially interested, and they will be liable for all the costs, expenses and damages which their unauthorized intermeddling may have occasioned."

Perry on Trusts, sec. 245.

"If a trustee convey an estate by a breach of trust, the purchaser under such circumstances becomes a trustee and liable in the same manner as the person from whom he purchased."

Perry on Trusts, sec. 828.

"If a person assumes to act as trustee and becomes possessed of the trust fund, and misapplies it, he cannot protect himself by showing that he was not legally a trustee. So, if the trustee is a member of a firm, and the trust fund is invested in the business of the partnership, the firm must account, and corporations are liable if the trust fund finds its way into their hands."

Perry on Trusts, sec. 846.

"Whoever knowingly aided him (the trustee) or knowingly participated with him in misapplying that (trust) fund, became, by reason of so doing and so participating, liable * to make the fund good by restoring it to the trust estate."**

Duckett vs. Mechanics Bank, 86 Md. 403.

The Wisconsin Court, in Harrigan vs. Gilchrist, 121 Wis. 127, on page 280-281, said, "The judgment is based, as to them, upon their joint participation in the wrong. In such circumstances all are liable as constructive co-trustees, and may be made to account in an equitable action. Every person who, through fraud of which he is guilty or has guilty knowledge, obtains property of another, equity will convert into a trustee for such other and deal with him in many respects the same in redressing the wrong to such other as if he were a trustee of an express trust. 1 Perry, Trusts, paragraphs 166, 167. When the fraud is perpetrated by several acting in concert, all are equally trustees and are jointly liable. Neither can escape any part of the liability because of the fact that his co-conspirator was the real beneficiary. The property received by each is deemed to have been received by all, and to constitute the subject of a single trust, with all the liabilities incident to the trust relation."

These fundamental principles in regard to the liability of persons participating in a breach of trust or intermeddling with the management of the trust apply as well to Banks as to all others.

"IF THE BANK PARTICIPATES WITH THE TRUSTEE IN A MISAPPROPRIATION OF THE FUND OR KNOWINGLY PERMITS SUCH MISAPPROPRIATION TO TAKE PLACE, IT MUST ANSWER TO THE BENEFICIARY FOR LOSS THEREBY OCCASIONED."

Vol. 3 Am. & Eng. Ency. of Law, 2nd ed., page 832.

"If the bank has notice or knowledge that a breach of trust is being committed **by an improper withdrawal of funds, or it it participates in the profits or fruits of the fraud, then it will be undoubtedly liable.**"

Duckett vs. Mechanics Bank, 86 Md., on page 406. Citing numerous authorities.

In the last case the bank was held liable for participating in the fraud of the trustee and the court further said: "Whoever knowingly aided him (the trustee) or **knowingly participated with him in misapplying that fund**, became by reason of so doing and so participating equally liable with him to make the fund good by restoring it to the trust estate."

And again: "If the bank knowingly aided and participated in Clagget's **breach of trust**, then the bank is beyond dispute as responsible to the new trustee as the defaulting trustee himself."

In Swift vs. Williams, et al., 68 Md. 236, a bank was held liable for participation in a breach of trust where they were not charged with a willful wrong, but **with negligence in failing to make inquiry and learn the true state of facts.**

See statement and opinion on page 254.

And in that case the court laid down the general proposition as applicable to banks in their statement on page 249: "It is well settled law that whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain as against the person who is equitably entitled to it, he will be held as holding it for such person who is rightfully entitled to it. If it be trust property, equity impresses the trust upon it in the hands of the transferee, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary."

Where a bank, in whose hands is the trust fund, participated with the trustee in a misapplication of the fund, it was

held that the bank is liable to the cestui que trust for any loss thereby incurred.

Bank of Greensboro vs. Clapp, 76 N. C. 482.

The court in that case used an expression that seems to us particularly applicable to this case when they said that the bank there was not authorized "in order to **save a desperate debt to participate in a breach of trust** in order to reap the benefit thereof." In that case, the bank, knowing that the fund was a trust fund, allowed the trustee to check out the sum of \$3,000 in payment of his own old debts, of which the bank held "**the lion's share,**" as the court put it.

The English rule is the same as the American, and was stated with considerable clearness by Lord Chancellor Cairns, on an appeal to the highest judicial authority in England, the House of Lords. The question there was on the liability of the bank for funds checked out by an executor. The Lord Chancellor said: "On the one hand it would be a most serious matters if bankers were to be allowed on light and trifling grounds, or grounds of mere suspicion or curiosity—to refuse to honor a check drawn by their customer, even though that customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and looking to their position as bankers merely, to insist that they were entitled to pay away money which constituted a part of trust property at a time **when they knew it was going to be misapplied**, and for the purpose of its being so misapplied. I think fortunately your Lordships will find **that the law on that point is clearly laid down**, and may be derived without hesitation from the authorities which have been cited in the argument at your Lordship's bar. And I apprehend that you will agree with me when I say that the result of those authorities is clearly this: In order that a banker be justified in refusing to pay a demand of his customer * * * * there must in the first place be some **misapplication, some breach of trust intended by the executor**, and there must be in the second place, as was said by Sir John Leach in the well-known case of *Keene v. Roberts*, 4 Madd. 357, **be proof that the bankers are privy to the intent**

to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated, for, that circumstance above all others will most readily establish the fact that the bankers are in privy with the breach of trust which is about to be committed."

Gray vs. Johnson, Law Reports, English & Irish Appeals, Vol. 3, page 1 (1868).

This Court has said: "If bankers had actual or constructive notice that the trustee was abusing his trust and applying the proceeds of the loans to his own use, they are liable."

Duncan vs. Jaudon, 82 U. S. 15 Wall. 165.

Lowry vs. Com. Farm Bank of Md., Tenney's Circuit Court Decisions 310.

"Full notice of the trust draws after it all the consequences of an express declaration of the trust as to all persons chargeable with such notice."

It is a well settled rule in equity, that all persons coming into possession of trust property with notice of the trust shall be considered as trustees, and bound with respect to that special property to the execution of the trust."

Mechanics Bank v. Seton, 1 Peters U. S. 299, on page 309.

And in the same case it was said: "If the bank has already been shown, was chargeable with the knowledge that Linn was a mere trustee, it could acquire no title from him discharged of the trust, and if necessary might itself be compelled to execute the trust."

Where a trustee sold property (bonds) through a bank, and had the proceeds put to his individual account, and checked it out, the banks were held liable in a bill in equity to account for the proceeds of the bonds, with interest, it appearing that they had notice of the trust, and they were held liable as parties to a breach of the trust. The court said of the bank: "Through their wrong the bonds have been placed beyond the reach of the rightful owners; they are responsible for that wrong to the value of the bonds with interest."

Covington vs. Anderson, 84 Tenn. 16 Lea 310.

"If one, acting as trustee, converted the trust property

without authority he is responsible, and he who purchased from him **or aids in the conversion with a knowledge of the want of authority** or under circumstances that will reasonably put one upon inquiry as regards the authority to sell or convert is also liable." Ibid.

"The acceptance of money, with notice of its ultimate destination, is sufficient to create a duty on the part of the bailee to devote it to the purpose intended."

McKee vs. Lannon, 159 U. S. 317.

"Funds on deposit in bank which have been checked out by the husband of the depositor in settlement of illegal deals in options and placed to the credit of a broker, **may be recovered from the bank** by the depositor, where the husband had no authority to draw checks on such deposits, except in transactions of the depositor's business and for her use, of which the broker had due notice, and **where the bank had notice of the nature of the deals for which the checks were given.**"

Pearce vs. Dill, 149 Ind. 136.

Under the law, the bank cannot escape being charged with full notice and knowledge of all the facts in regard to the diversion of our client's moneys. "Knowledge to the cashier is knowledge to the bank."

Duncan vs. Jaudon, 82 U. S. 165.

"Notice to the board of directors was notice to the bank and no subsequent change of directors could require a new notice."

1 Peters, U. S. 299.

Where a bank officer is acting as president or director of another concern, or as trustee or executor of an estate, the knowledge acquired in the latter capacity **is imputed to his bank** according to the **better rule**.

Ency. of Law & Procedure, Vol. 5, Page 461, and cases cited in note 21.

See also 29 N. J. Eq. page 98.

The bank is charged with the knowledge acquired by its cashier, president or other officers, pertaining to transactions within the scope of the bank's business, although such knowledge be acquired in another transaction than that to which it relates.

Ency. of Law & Procedure, Vol. 5, page 460.

Of course here the **full knowledge** is brought home to the **cashier, president, assistant cashier and directors** at the time the original arrangement was entered into, and again and again while it was being carried on, and it continued for over two years, with the bank the **most interested party and participating in the entire matter for its own financial benefit.**

No matter what form writings may take, the true agreement can always be shown. A writing never shuts out parole evidence except as to the parties to it, that is, the rule in regard to permitting parole testimony to vary the terms of a written instrument applies only to the parties and their privies. It has no application to strangers.

Am. & Eng. Ency. of Law, 2nd ed., Vol. 21, page 1103.

So, too, an arrangement in form made with an officer of the bank **in his own private name**, can always be shown by parole to have been **done by him as an officer of or agent of or as acting for the bank.** This is settled in our own state in Northern National Bank vs. Lewis, et al., 78 Wis. 475.

From the facts in this case, and the law applicable thereto, we feel convinced that the defendant bank must be held to have had **notice and knowledge of and to have participated in a diversion of the plaintiff's funds made by its officers in running the creamery business**, nominally under the name of Jenne Creamery Company.

It seems to us self-evident, that the business would not have been continued by these officers of the bank unless it had been **that the bank was financially interested in saving the assets**, and that as a matter of fact the business was continued with the desperate hope of, and for the purpose of, saving something, if possible, **to the bank out of the wreck.**

Whatever the motive was, it must be conceded that the **result of the acts of the bank and its officers in nominally continuing the Jenne Creamery Company as a corporation and in holding out its officers as actually interested therein was the cause of any loss the plaintiffs may sustain**, and for the results of such acts the party is liable.

As the Supreme Court of the United States said, in a somewhat similar case: **"Results rather than motives are significant as to determining liability."**

Union Stock Yards Bank vs. Gillespie, 137 U. S., on page 417.

The court on ample evidence found positively that the arrangement for continuing the Jenne Creamery Company's business was made with the bank; that under such arrangement the bank, through its officers and directors, continued the business; that such continuance of the business was in the interest of the bank and with its full knowledge and consent; and that through its officers and directors the bank participated therein and was a party thereto.

Findings 8-10 and 11. Pages 118-119, Printed Record.

Also, findings 30-31-32-33-34, Printed Record, pages 127-128.

And the diversion of the funds of the June to September patrons was a diversion by the bank, made with its full knowledge and with the full knowledge of the rights and ownership of said patrons and was a breach of trust in which the bank participated and for which it is liable.

Finding 35, Printed Record, page 128.

So clear was the evidence as to the participation of the bank in the breaches of trust (the diversion of patrons' funds) and so clearly was it done at the bank's instance and for the bank's benefit that the trial judge, after hearing all the evidence, in his written opinion (Printed Record, pages 28-29), said: "Upon consideration of this case I am satisfied that the affairs of the Jennes and of the Jenne Creamery Company were taken over and managed by the three directors of the bank primarily for the benefit of the bank, and that their management was in effect that of the bank. The bank through these three and its other directors had full knowledge of the matter and of the manner in which the business of the various creameries was being conducted. The deposits from the receipts of butter were trust moneys under the contracts and course of dealing with the various creameries and the patrons who furnished the milk were the real owners of the net receipts from butter less the amount payable to the creameries under the contracts for making. The bank must be held to know of this trust and of the real ownership of the moneys so received. * * * ."

"As to all unpaid checks for the months previous to October (1904) there appears no evidence of the amount of cash on hand by the bank prior to September 28, and no other evidence from which it can be inferred that the trust money represented by said checks, or evidenced by them, was held by the bank when it stopped business. I think, however, that the bank must be held to have so treated such funds, by mingling them with its own, as to be liable for the amount of all such checks as a general creditor."

B.

As to the liability for the Receiver to refund the two thousand five hundred and twenty dollars and forty-six cents (\$2,520.46) of the proceeds of the sales of October and November butter which were all traced and found to come into his hands, there is, in our minds, no question. Under the arrangement, the patrons who furnished the milk were the equitable and beneficial owners of this much of the funds received from the sale of the butter made from their milk.

The fund was received by the bank in checks. The checks were sent to its correspondents. They collected them. The proceeds thus collected were in their hands when the bank failed and came to the Receiver. The patrons' claims have all been assigned to Emigh and Atkins (the defendants in error here—the plaintiffs below) and whether the bank ran the creamery or the Jenne Creamery Company ran it or whether they were connected in its management or not, the Receiver having come into possession of the proceeds of these October and November, 1904, shipments, has possession of a fund of which our clients are the equitable and beneficial owners. These funds are not the funds of the bank and their return to the true owners does not deplete the funds of the bank. The judgment or decree awarding them to our clients is manifestly right.

As to the four hundred six dollars and ninety-seven cents (\$406.97), the proceeds of shipments of butter for months prior to October, 1904, there can be no question of the bank's liability to pay to the owners of such fund the same dividend as to other creditors. If the bank was, in fact, running the creamery (though for its own reasons it held out that the Jenne Creamery Company was still in existence and still running it and that its officers were individually interested

therein) then the four hundred six dollars and ninety-seven cents (\$406.97) is its own debt on which it is bound to pay a dividend, the same as to its other creditors. That is the fact, as found by the lower court.

If the formal keeping up of the name of the Jenne Creamery Company should be considered to make any technical difference, it would not make any **real** difference, because then the bank would be liable for its wrongful act in diverting the trust funds or in participating in the diversion thereof,—it being clear and being found that the bank, its officers and directors knew all about all of the facts in regard to the business carried on and the equitable ownership of the funds.

C.

Opposing counsel, in the lower court, called attention to sections 1684-2 of chapter 356 of the Laws of 1899 of Wisconsin, and the cases of *Grange vs. Reigh*, 93 Wis. 552, and *Gifford vs. Hardell*, 88 Wis., 538-541, holding that where checks are not presented with reasonable promptness and the bank meanwhile fails, the **drawer** of the check is discharged from liability to the extent of the loss. What bearing this rule has here we are unable to see.

The Jenne Creamery Company's account was always overdrawn and was at the time of the failure overdrawn \$2,536.53, (though by fictitious crediting of the October and November patrons' uncollected moneys to the amount of \$1,710.53 the bank account, on its face at the failure, showed an overdraft of only \$825.98).

No one lost anything by the delay in presenting the checks and the rule has no application.

Kinyon vs. Stanton, 44 Wis. 479-480.

Certainly the Jenne Creamery Company's account being overdrawn the **failure** to present the checks did not cause a loss to it, or anyone, except the holders of the checks themselves, who will have to take a dividend instead of full payment, because these June to September patrons could not trace the proceeds of their butter, the amount of which, as Mr. Brown testifies, was evidenced by these checks, into the hands of the receiver.

The only use of these checks in this case was because, Mr.

Brown testified, that they evidenced the true proportion of the proceeds of the sale of the butter for the different months, which went to the different patrons named in these checks.

And the bank's liability to Emigh and Atkins, as assignees of these patrons does not depend in any way upon the existence or non-existence of these checks, but does depend upon the fact that the bank in its own interest and through its own officers participated in and was responsible for the wrongful breaches of trust by which the moneys belonging to said patrons were diverted from them to the payment (or reduction) of the overdraft at the bank.

III.

Counsel for appellant in their brief below contended at some length that the acts of the Berlin National Bank in this case were *ultra vires*; that the bank, or its receiver, can set up such fact as a defense and that therefore neither the bank, nor its receiver, are at all liable to the plaintiffs.

In other words, they admit the trust relation; they admit the wrongful breaches of trust, by the diversion of funds; they admit the bank's participation in, and knowledge of, the nature of the funds and of the diversion thereof; they admit that they have our funds; and they sit back and say that they can take advantage of their own wrong to relieve them of liability.

This argument (?) carried to its logical conclusion would mean that a bank, which by fraud, crime or wrongful breach of trust, secured to itself the money or property of others, could not be compelled by courts to restore it, or respond in damages because its acts were *ultra vires*.

Besides being bad law appellant's contention on this question is of no importance for various reasons.

A.

Their liability in this case is not necessarily founded on the fact (correctly found from the evidence, however) that the bank was through its officers running the defendant bank in its own interest.

Its liability depends primarily upon the fact that the trust funds of the patrons came into its hands (it having notice and knowledge of the nature of the patrons' ownership thereof),

and that such funds were trust funds and have been traced into the hands of the bank, itself, from there into the hands of its correspondent banks (to whom the checks were sent for collection), and were shown to have remained there until the defendant receiver was appointed, and to have been turned over thereafter to him. A considerable part, however, were shown to have gone directly into the receiver's hands after the bank's failure. And these funds the bank could not by any fictitious bank entries, or in any other way, apply, for its own interest, against the overdraft or other indebtedness of the Jenne Creamery Company to it, as the bank had full knowledge of the situation and of the ownership of the funds at all times.

And as to the few hundred dollars of funds not traced into the receiver's hands the bank's liability depends on the fact that it ran the creamery company, or colluded with those running the Jenne Creamery Company, to apply such funds to prior overdrafts, or indebtedness in prior months, so that the funds were diverted and were not there when the bank failed, and the bank having notice and knowledge of the facts could not itself convert the funds or participate in such fraud and breach of trust without becoming liable as a participant therein, though as to such funds the only recovery would be a pro-rata dividend on the amount of such liability with the other creditors.

Therefore the question whether the bank could lawfully do that which it did do, i. e., run the creamery company through its own officers and in its own interest is immaterial and in this case purely academic.

That it did so run the business has (as heretofore shown) been found by the lower court on ample and satisfactory evidence.

But except as it is strong and additional and conclusive proof of notice to, and knowledge of, the bank, it is perhaps immaterial.

The court found that the notice and knowledge of the bank and its participation in the breaches of trust existed independently of the proposition and finding that the bank was itself running the Creamery Company.

Findings, 6-10-11-12-28-31-32, and more especially findings 34 and 35. Pages 118-119, 126-128, Printed Record.

In the cases cited under headings I and II it is clearly shown that the bank's liability may exist (and in such cases it did exist) without its having, itself, taken over the actual running of the business of the broker, commission man, or middle man. Its liability depends upon the nature of the fund and its notice, knowledge and participation in the attempted breach of trust and unlawful diversion thereof.

B.

The ultra vires contention of the bank's counsel has no bearing here for another good reason.

IT IS A FUNDAMENTAL PRINCIPLE THAT THE DEFENSE OF ULTRA VIRES CANNOT BE INTERPOSED TO A CLAIM ARISING OUT OF A TORT, FRAUD OR WRONG.

The plaintiffs here are not suing to enforce a contract with the bank or its receiver. This is not a suit upon a contract.

This action is founded upon a breach of trust or wrong;—upon a wrongful and unlawful diversion of the funds of the patrons.

A large part of the funds came into the hands of the bank, and have been traced from it to its correspondent banks and from them to its receiver, where the same were, as admitted by the pleadings and found by the court upon all the evidence, at the time of the commencement of this action. The bank and its receiver wrongfully claim the right to divert these funds to the payment or reduction of the overdraft of the Jenne Creamery Company.

The receiver at this moment is claiming, and is wrongfully attempting to divert, said patrons' funds to such overdraft, including a large amount thereof that came directly to his hands after the bank failed. It is against such wrongful breach of trust and against such unlawful diversion of funds that we are seeking relief, and as to the small amount of funds not traced into the receiver's hands the liability sought to be enforced against the bank is upon the very ground of its unlawful and wrongful participation in the breaches of trust

whereby such funds were unlawfully diverted to apply on the Jenne Creamery Company overdraft, the bank participating in and having full notice and knowledge of such wrongful acts.

These funds are either the funds of the bank as a bank or they are the funds of the patrons; if they are the funds of the bank as a bank, the receiver is entitled to them; if they are the funds of the patrons, they no more belong to the receiver than do funds of any other individual in the United States. To attempt to use funds belonging to private individuals to pay claims against a bank is a fraud. The receiver in this case is attempting to carry out this identical wrong.

Suppose a national bank has not power to run a creamery, does it therefore follow that a receiver of a national bank can divert funds belonging to others to pay claims against the bank?

Where a bank or corporation enters into a **contract** wholly and entirely without its corporate power, it is true that it may often times on the ground of ultra vires prevent the enforcement thereof; but even in such cases the corporation, where it has received the proceeds or benefits accruing to it under such contract, cannot prevent the party in a **proper form of action** recovering the same.

But the distinctive feature of this case is, that it is not an attempt to enforce against the bank or its receiver any contractual right whatever, but this action is brought solely and wholly because of the unlawful and wrongful acts of the bank and its receiver in attempting to wrongfully divert our money to the payment of the Jenne Creamery Company's overdraft, the bank and its receiver knowing that the true ownership of the funds was in others.

THE DEFENSE OF ULTRA VIRES CANNOT BE SET UP AGAINST A LIABILITY FOUNDED UPON A WRONG, FRAUD OR TORT. THIS FUNDAMENTAL PROPOSITION APPLIES TO NATIONAL BANKS AS WELL AS TO ANY OTHER CORPORATION.

"If a corporation obtained a wrongful advantage of another in respect to a transaction outside its corporate powers, it cannot shield itself from liability to remedy the wrong by the doctrine of ultra vires." The whole argument of the de-

fense in this case is well answered by the decision of the Supreme Court of the state of Wisconsin in:

Zinc Carbonate Co. vs. First National Bank of Shullsburg, 103 Wis. 125.

"Corporations are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application." "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the objects of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel."

National Bank vs. Graham, 100 U. S. 699, on page 702;
See also Salt Lake City vs. Hollister, 118 U. S. 256;
Denver & Rio Grande R. R. vs. Harris, 122 U. S. 597;
Johnson Fife Hat Co. vs. Nat'l Bank of Guthrie, 4 Ok.
17.

"A corporation like this bank may become a party to a conspiracy to defraud, and be held liable as a joint tortfeasor to the same extent and under the same circumstances as natural persons for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of the injured party for every grade and description of forcible, malicious and negligent tort or wrong which it commits, **however foreign to its nature or beyond its granted powers the wrongful transaction or act may be.**"

Wright vs. Stewart, et al. (et al. includes the bank),
130 Fed. R. 905, on page 914.

See same case on appeal, where it is said by Circuit Judge Hook in the opinion of the court affirming the district court, that "it is also well settled that **a corporation cannot escape liability upon a plea that the tortuous acts were ultra vires.**"

Stewart vs. Wright, 147 Fed. Rep. on page 328. Numerous cases in point cited in opinion.

Nevada Bank of San Francisco vs. Portland National Bank, 59 Fed. Rep. 338.

Interstate Bank vs. Claxton, 80 S. W. Rep. (Texas) 605.

Of course neither a bank nor any other corporation is incorporated to do wrong or commit frauds or torts, but when

they do wrongful acts or commit frauds or wrongs, they cannot shield themselves behind a claim of ultra vires.

This principle is well recognized and has been tersely put as follows:

"As the law confers no authority on corporations to do wrong, every wrongful act is technically ultra vires, yet in such cases it has no application, and banks are liable for the acts of their servants to the same extent that individuals would be."

Article on Banks and Banking, Vol. 5, Cyc. Law & Proceed. page 478, and numerous cases there cited.

See also Salt Lake City vs. Hollister, 118 U. S. 256;

Denver & Rio Grande Ry. vs. Harris, 122 U. S. 597;

Stewart vs. Wright, 147 Fed. Rep. 321, on page 327, and cases there cited;

National Bank vs. Graham, 100 U. S., on page 702;

L. S. & M. S. Ry. vs. Prentice, 147 U. S. 101, and New Y. C. Ry. v. U. S., 212 U. S. 481.

"If the agents and servants of a corporation commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is ultra vires, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement."

Chesapeake & Ohio Ry Co. vs. Howard, 178 U. S. 153, on page 160.

It is now well established that in actions for tort a corporation may be held responsible for damages for the acts of its agent within the scope of his employment.

New York Cent. R. R. v. U. S., 212 U. S., p. 493.

And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases, the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal * * * and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.

New York C. R. R. v. U. S. supra.

Lothrop v. Adams, 133 Mass. 471.

A corporation is held responsible for acts not within the

agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need by no written authority under seal, or vote of the corporation, in order to constitute the agency or to authorize the act.

New York C. R. R. v. U. S., *supra*.

Washington Gas Light Co. v. Lansden, 172 U. S. 534, 544.

C.

The defense of *ultra vires* is not pleadable here.

The bank had, and the receiver obtained from it, trust funds which belonged to us. These funds of ours the lower courts have directed him to return to us, in addition the bank has been held liable for a few hundred dollars which it itself diverted or in the diversion of which it participated and for which it is liable to us, because the loss was sustained by its wrongful act or willful participation in a wrongful act, and on this amount the receiver has been directed to pay us, on such amount, the same dividend as other creditors of the bank receive.

This determination of the lower courts was right, whether the bank had the legal power to operate the creamery or not, and we fail to see why it would not have been liable in exactly the same way even if, as a matter of fact, it had not been running the creamery.

It seems to us it must return our trust funds, and it must be liable for any loss by diversion of a part of them in which diversion it participated or which it permitted with knowledge of our rights.

The crucial facts on which its liability to us depend exist whether it was running the creamery in its own interest or not.

As the supreme court of Wisconsin says: "No authority has been cited, and we think none can be, to deny the power of a banking corporation, or any other corporation, to disgorge property of another, which it had got into its possession by any means whatever under a duty to disgorge."

Emigh v. Earling, 134 Wis. 565, 575.

The bank in accepting the checks and sending them for de-

posit, was acting in the performance of its lawful powers. And its receiver's liability depends upon the fact that they wrongfully claim the right to divert them and have failed to pay over to us our funds still, however, in their hands; and have failed to account to us for a part of those funds which they knew to be trust funds, and which they knew we were the equitable and beneficial owners of, for which they are liable because they unlawfully and wrongfully diverted, or participated knowingly and wrongfully in the diversion of, them.

D.

Another good reason why the argument of counsel on the question of **ultra vires** is inapplicable here is:

THAT THE TAKING OVER OF THE CAPITAL STOCK OF THE JENNE CREAMERY COMPANY BY THE BANK'S OFFICERS AND THEIR CARRYING ON THE BUSINESS IN THE INTEREST OF THE BANK WAS NOT **ULTRA VIRES**, BUT WAS A LEGITIMATE AND PROPER (THOUGH IN THIS CASE POSSIBLY INJUDICIOUS) METHOD OF ATTEMPTING TO COLLECT THE LARGE AMOUNTS DUE THE BANK AT THE TIME THE ARRANGEMENT WAS MADE.

"Banks possess large power to take and utilize property taken for a past debt in order to save themselves from loss. The most general principle is, that a bank may do whatever is necessary to render productive, property it has taken for a debt.

Article on Banks and Banking, Vol. 5 Cyc. of Law & Proced., page 492.

Lowe vs. Ring, 106 Wis. 647.

Same case, 115 Wis. 575.

In the last case the court held, that an officer of a corporation may "with the knowledge and acquiescence of the directors or with their subsequent acquiescence enter into any contract necessary or usual in the course of the business for which the corporation was created or reasonably incident thereto without authority first being given therefor by a formal vote of the directors, and that such authority may be inferred from the conduct of the directors or from their knowledge of the fact and failure to make objection."

"To secure past advances (the bank here was attempting to secure payment of past advances) a **national bank** may take real estate or its own stock. A very wide latitude is given to a bank to take property to prevent loss of a debt and to use and improve it temporarily until an advantageous disposition can be made of it."

Vol. 5, Cyc. of Law & Proced., page 591, and cases there cited.

National Bank vs. Case, 99 U. S. 628.

Vol 3 Am & Eng Enc 2nd Ed. 1800; Reynolds v
In the case just cited it appeared that Phelps McCullough & Co. owed the Germania National Bank \$14,000. The Germania National Bank had as collateral security to this 100 shares of stock in the Crescent City National Bank of New Orleans. The note not being paid, the Germania Bank had this 100 shares of stock transferred on the books of the Crescent City Bank to one of its clerks, Waldo, in whose name it stood when the Crescent City National Bank failed. It was held that the Germania Bank was the real owner of the shares of stock, that it was estopped to deny its authority under the law to accept these shares, and was liable in an action for contribution under the national banking act. *Sec. 11 R.R. 307*

In California Bank vs. Kennedy, 167 U. S. 362, on page 366, this court said: "No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept **stock of another corporation as collateral**, and by the enforcement of its rights as pledgee it may become the owner of the collateral." And again: "So also a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness,"

Citing First Nat'l Bank vs. Nat'l Exch. Bank, 92 U. S. 122-128.

In the case at bar it is clear that the stock of the Jenne Creamery Company was taken by the bank's officers in its interest for the very purpose of working out and securing the payment of past advances. The transaction was in the nature of a compromise agreement whereby it was hoped the bank would make its claim.

On this subject Chief Justice Waite, in *First National Bank vs. National Exchange Bank*, 92 U. S., on page 127, said, speaking of the bank's power: "Its own obligations must be met, and debts due it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are often times the necessary result of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank and are submitted to their judgment and discretion except to the extent that they are restrained by the charter or by-laws. **Banks may do in this behalf whatever natural persons could do under like circumstances.**"

In the case of *California Bank vs. Kennedy*, it was admitted at the trial that the stock in the other corporations taken by the National bank was not "taken as security or anything of the kind." The acquiring of the bank's stock in the other corporation in that case having nothing to do with the securing of an indebtedness to the bank, present or past, it was held that it was without the power of the bank to hold such stock; but it is clearly intimated in that opinion that had the stock been taken as security for an indebtedness or as part of an arrangement to work out the payment of an indebtedness to the bank, it would have been a fair and proper transaction.

So in *First National Bank of Ottawa vs. Converse* (cited by opposing counsel below), 200 U. S. 425, the national bank held shares of stock in a Minnesota corporation, the purpose of which Minnesota corporation, as its charter was construed by the Minnesota court (which construction the United States Court accepted as binding on it) was **the purely speculative business** of buying and selling stock and assets of an existing insolvent corporation with power, but without the obligation to engage as an independent enterprise in the manufacturing business, and this court reiterating the principles for which we contend that "a bank may in the usual course of doing business accept stock of another corporation as collateral and by the enforcement of its rights as pledgee it may become the

owner of the collateral and be subject to liability as other stockholders," and that

"So also a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation **as security for a previous indebtedness**," was obliged to hold in that case that the holding of stock there was unlawful because no authority is conferred upon national banks to engage in or permit "purely speculative business or adventure."

In other words, the court felt bound to adopt the construction of the corporate charter given by the courts of Minnesota, which had classified it as a corporation to speculate in stocks and property, and on that ground alone held it unlawful for the national bank to hold stock therein. The inference from the case being equally plain, that had the national bank taken the stock in the other corporation, and the other corporation been organized to continue the manufacturing business of the former debtor of the bank, and the bank having intended thus to work out its indebtedness, that it would have been in all respects a valid arrangement.

The right of a bank (taking or holding stock for the purpose of securing past or present indebtedness), to take the active hand in running the other corporation's business, for the purpose and with the expectation of deriving profit therefrom to apply on the claim of the bank has never been questioned in any case that we can find.

In *Bank v. Converse*, *supra*, it was not the taking of stock in another corporation, it was not the participating by the bank as a stockholder in its operation that the court criticised, nor was it that, that the court said was *ultra vires*.

It was, in the language of the court itself, "**the speculative venture**" which was *ultra vires*.

See opinion, last paragraph, page 439.

So, too, there is nothing in *Merchants' National Bank vs. Wehrmann*, 202 U. S. 295, at variance with our position on this question. This case simply held that a national bank cannot take shares in a partnership or become a member of a partnership as a business venture. The supreme court reserved the question whether it could have accepted an assignment of such

shares representing a partnership interest to secure a debt. This was a partnership under the laws of Ohio, where the interests of the different partners were represented by shares.

In brief, in what the bank did here looking toward the payment of its indebtedness, its proceedings were within its well recognized right to act in attempting to save the indebtedness due it.

An apology is perhaps due the court for reference to this question, as we believe it is purely academic, cannot by any possibility be involved in the case, and has no bearing on the decision to be rendered herein.

In our opinion our claims in no wise depend upon whether the bank did or did not, or could or could not, through its officers, hold this stock.

IV.

Counsel below contended that the returning to the patrons and their assignees of the trust funds traced into the receiver's hands violated the provisions of the United States Statutes 5236 in regard to ratable distribution of the assets of banks.

If the funds are trust funds and are **our funds**, then the returning of such funds to us in no wise affects the assets of the bank.

The giving back to us of funds which are wrongfully claimed by the receiver as part of the bank's assets, but which are rightfully ours, does not affect the rights of creditors of the bank.

The acts of the bank and its receiver in attempting to divert from our clients and to retain a fund has wrongfully swelled the fund in the receiver's hands. The fund being still in the receiver's hands, the compelling of its return leaves the assets of the bank undiminished and just as they would have been had the bank and its receiver not made their wrongful claim to our funds, but let them be distributed to the true owners as they should have done.

That the Federal Courts have long compelled receivers of National Banks to return such trust funds, wrongfully withheld, but traced into the receiver's hands, is well established.

Some of the cases are:

Richardson vs. New Orleans Debenture & Redemption Co., 102 F. R. 780.

Richardson vs. Louisville Banking Co., 94 Fed. Rep. 442.

Massey vs. Fisher, 62 Fed. Rep. 958.

Frelinghuysen vs. Nugent, 36 Fed. Rep. 229-239.

The last case quoted with approval in *Peters vs. Bain*, 133 U. S. 670. *Richardson vs. Oliver*, 105 Fed. Rep. 277.

This Court, after a discussion of the federal statutes relating to the distribution of assets of National Banks, said: "The requirement as to ratable dividends is to make them from **what belongs to the bank, and that which, at the time of the insolvency, belongs of right to the debtor, does not belong to the bank.**"

Scott vs. Armstrong, 146 U. S. 499, on page 510.

Where a National Bank took commercial paper for collection and sent it to its correspondent banks **for collection**, and the funds collected were still held by the correspondent banks, at the time of the first bank's failure, the Supreme Court of the United States said of these funds:

"They were traceable as separate and specific funds, and, therefore, the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from the sub-agents, he was in fact collecting them as the agent of the principal. **No mere book-keeping between the Fidelity and its Sub-agents could change the actual status of the parties, or destroy rights which arise out of the real facts of the transaction.**"

Commercial National Bank of Pennsylvania vs. Armstrong, 148 U. S. 50, at bottom of page 57 and top of page 58.

In the last case, this Court, speaking of the claim of the receiver of the insolvent bank to such funds, said:

"Such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee for the benefit of its general creditors."

The basis on which recovery of the funds traced is sought, in this action, is that the property is ours—not the bank's.

The action (so far as such funds are concerned) is based solely on a right to specific property.

Complaint, Printed Record, pages 26, 27.

We are not asking to be declared preferred creditors, but are asking to be **declared owners of the funds** traced into the receiver's hands and to have the same back as **our own property**. The courts have so often reiterated this fundamental doctrine that it needs no discussion here.

“The right of action to trace the moneys and charge the fund has its basis in the right of property, but never upon the theory of preference by reason of an unlawful conversion.”

Boyle vs. Northwestern National Bank, 125 Wis. 498-509, and other cases there cited.

V.

The contention of the receiver's counsel below that the interest of the bank officers to whom the stock of the Creamery Company was transferred was so adverse to that of the bank that their notice and knowledge could not be imputed to the bank, seems to us to require no answer.

They took their stock and performed the work necessary in carrying on the affairs of the Jenne Creamery Company, as the undisputed facts show, without any remuneration whatever, and **solely because of the bank's interest as a creditor of the Jenne Creamery Company and the Jennes**.

And in this case the evidence further showed conclusively that not only did these officers of the bank have notice and knowledge of all that was done, but in addition, showed conclusively, and the court found, that the matter was brought home to the directors at their meetings and at divers other times. **The whole transaction was originally laid before them, reports thereafter were made to them, and everybody in and about the bank knew at all times about the whole transaction.**

Findings 6, 7 and 8, Printed Record, page 118;

Findings 10 and 11, page 119;

Findings 30-31, pages 127-8;

Finding 34, page 128.

The testimony above referred to abundantly supports the findings.

All the accounts of the Creamery Company were kept by the bank, and the wrongful diversion of the funds prior to October and the attempted wrongful diversion of the October and November funds was a transaction that **took place in the bank.**

It will be noted that as the court found, and the evidence showed, notice and knowledge came not only to the bank's officers and to its directors, but **to the board of directors as a body**, the original situation being laid before the board, and thereafter reports being made to it and it sometimes being, as Mr. Brown testified, **the sole or main topic for consideration at its meetings.**

VI.

From the position that the bank was not chargeable with notice of what its officers and directors knew and were doing, the receiver's counsel, in their brief in the court below, shifted their position so as to claim that Emigh and Atkins and their assignors were without equity, and that they were bound to know that the bank was running the creamery, because Brown, Steadman and Foster, who became the officers of the Jenne Creamery Company, were officers of the bank.

In the first place, whether the Jenne Creamery Company ran it, or the bank ran it, makes no difference, as no one in running the Creamery Company business under the arrangement with the patrons had the right to divert the funds belonging to the patrons to the payment or reduction of the Jenne Creamery Company's old overdraft or indebtedness. Further than this, the patrons never knew that the bank was running, or was interested in the running of, the Jenne Creamery Company.

On the other hand, it was positively and **falsely** represented to them that it was being run by Steadman, Brown and Foster, and that they had bought out the Jennes.

Findings 31-32, page 128.

It is almost worth while to notice the things that the patrons were not informed of and did not know.

They did not know the bank was interested in, or participating in, the running of the Jenne Creamery Company, and on this point they were purposely misled.

They did not know the Jenne Creamery Company was insolvent. The written document from the Jennes to Brown which showed this fact was never put on record by Brown nor the bank.

They did not know their funds were being diverted. Because those running the business kept robbing Peter to pay Paul.

But assuming that the bank was running it, and the patrons knew it, that would have given the bank no right to wrongfully divert their funds.

In this connection, too, it may be well to state that the evidence shows that the patrons of one month were often different individuals than the patrons of the preceding or succeeding month.

VII.

We submit that this entire proceeding, including the relief asked and given, and the form in which the same has been decreed, are supported by the evidence, warranted by the authorities and in line with all the precedents.

The lower court held Emigh and Atkins, assignees of the various patrons, entitled to a dividend on the \$406.77 (not traced into the receiver's hands) and interest on the amount of any dividend **theretofore** declared, in addition to their pro rata share of such dividend. This was in accordance with the rule finally laid down in *Armstrong vs. American Exchange National Bank and its Receiver*, 133 U. S. 433, on page 470.

The lower courts did not allow interest on the trust funds traced and directed to be paid over by the receiver to the plaintiffs, because of the decision of the Circuit Court of Appeals in *Richardson vs. Louisville Banking Company*, 94 Fed. Rep. 442, which is against the allowance of interest on such trust funds, the decision going on the theory that the trust fund did not earn interest while in the hands of the receiver or comptroller.

The court did not authorize the issuing of an execution to enforce the judgment against the receiver, but held the proper method was to direct that the judgment be brought to the comptroller's attention for his guidance.

Earl, Receiver, vs. Pennsylvania, 178 U. S. 449-455.

The judgment to be certified by the Receiver to the comptroller, to be paid in the due course of administration.

Bank vs. Vermont Natl. and its Receiver, 22 Fed. Rep. 186.

A somewhat similar judgment in a case like the present, where part of the funds were traced and ordered returned, and a dividend allowed on the part not traced, will be found in:

Richardson vs. Continental Nat'l Bank, 94 Fed. Rep. 453.

The court will note that the judgment in this case is carefully drawn within the federal precedents.

The receiver of a national bank is not an officer of the United States court, and no leave of such court to sue was therefore necessary.

In re Chetwood, 165 U. S. 443-458.

By section 4, 25 U. S. Stat. at Large, page 436, jurisdiction of suits against national banks is conferred upon state courts.

Jurisdiction to adjudicate claims against receivers of national banks is conferred upon any "court of competent jurisdiction."

Sec. 5236, Revised Statutes of the United States.

This Court has upheld the jurisdiction of state courts against receivers of national banks, holding that such receiver is not the officer of any court, and that therefore he might be made a party defendant in the state court without leave of anybody.

In re Chetwood, 165 U. S. 443-458.

As there said: "The suit was properly brought in the state court, proceeded to judgment, and was carried to the supreme court of California on appeal. These courts undeniably had jurisdiction over the suit and the parties."

The form of the judgment in the state court and the fact that the comptroller must govern himself in accordance therewith is also referred to in:

Earl vs. Pennsylvania, 178 U. S. on p. 455;

Earl vs. Conway, 178 U. S. 456-457.

Costs were allowed in accordance with federal precedents.

In *White vs. Knox*, 111 U. S. 784, on page 788, this court said: "No provision is made by law for the payment of the expenses of the claimant in his litigation **beyond the taxable costs.**"

In *Armstrong vs. American Exchange Bank*, 133 U. S. 433, costs were decreed. See page 439. And the decrees as given below were affirmed. See page 470.

The decree against a receiver of a bank is with costs. *E. T. Bank vs. Vermont National*, 22 Fed. Rep. 186-189.

In *Merrill vs. First National Bank of Jacksonville*, 75 Fed. Rep. 148-154, the circuit court of appeals decreed costs against the receiver of a bank; which decree was in all respects affirmed in this Court.

173 U. S. 131-147.

Case vs. Bank, 100 U. S. 446.

Costs were also allowed in *Richardson vs. Continental National Bank*, 94 Fed. Rep. 442-446.

IN CONCLUSION.

We respectfully submit that the findings of fact and conclusions of law of the trial court, affirmed by the state supreme court, are supported by the evidence and the authorities, that the judgment rendered thereon is right and should be affirmed.

Respectfully submitted,

J. C. THOMPSON,

Solicitor for Defendants in Error.

MR. E. F. KILEEN,

Of Counsel.

In the Supreme Court of the United States

P. R. EARLING, Receiver of the Berlin National Bank
and the Berlin National Bank,

Plaintiffs in Error,

vs.

JOHN EMIGH AND O. L. ATKINS,

Defendants in Error.

SUPPLEMENTAL OR REPLY BRIEF FOR DEFENDANTS IN ERROR.

Our main brief having been printed before the receipt of the brief of the other side, we believe a supplemental brief excusable.

I.

Counsel for Plaintiffs in error, on pages 68-76 of their brief, for the first time, raise the proposition that the delivery of the patron's milk to the creamery was an outright sale and that, consequently, they were not the beneficial or equitable owners of the proceeds within the meaning of those terms as used in *Union Stock Yards Bank v. Gillespie*, 137 U. S., 411.

This question was not raised by them in the trial court nor in the Supreme Court of Wisconsin.

See Certificate, Transcript of Record, pp. 142-144.

Nor was it one of the errors set out in the petition for the writ of error herein.

Transcript of Record, pp. 1-3.

Nor does it come within the assignments of error in this Court.

Transcript of Record, pp. 145-146.

A question first raised on appeal and after trial in lower court comes too late.

Reavis v. Fianza, No. 16.

October, 1909, Calendar U. S. S. C.

Further, the construction of such an agreement and the determination of the rights of the parties thereunder is to be made in accordance with the laws of the place where made and executed and does not raise a federal question.

And therefor, the rights of the parties as found and determined by the Supreme Court of Wisconsin are, as we understand it, verities here, in so as they find Emigh and Atkins and their assignors to have been and to be the beneficial and equitable owners of the milk and butter and of the proceeds thereof.

Further, the Wisconsin courts were correct in holding that the patrons were the beneficial and equitable owners of the proceeds of the butter manufactured from their milk.

In considering contracts of this kind, it is undoubtedly true that each contract must stand on its own footing, we therefore call attention here to the fact that the foundation of the agreement in this case between the Creamery Company and the patrons of the different receiving stations goes back to the leases made by the owners of these several receiving stations with the Creamery Company. These leasing agreements contain provisions for the benefit of the patrons whereby the Creamery Company agreed to operate these stations and agreed "to make the butter **for the patrons** of this factory for three and one-half cents per pound whenever butter was selling for seventeen cents per pound or over and for three cents per pound whenever it shall sell below seventeen cents per pound."

Transcript of Record, pp. 89-90.

The leases of the other receiving stations and factories contain the same or very similar provisions and were thereafter omitted in the transcript of record.

See Stipulation Transcript of Record, p. 147, in regard to the admission of Exhibits 1, 2, 5, 7, 8, and 9, which will be found, however, in the original record on pp. 161, 162, 165, 172, 174, and 176.

The exact nature of the transaction is well set forth in the 12th, 13th and 14th findings of fact, Transcript of Record, pp. 119-120, from which it will clearly be seen that the agreement was for the Creamery Company to take the milk of the patrons and make it into butter **for them** at a certain price per pound. This the Creamery Company was obligated to do under their leases and agreements with the factories' owners. This made the patrons the owners of the butter, made from the milk furnished by them, subject to the right of the Creamery Company to claim and have its three or three and one-half cents per pound for the making thereof. This is as far as the provisions in the leases went and unquestionably left the patrons **the beneficial and equitable owners**, if not the legal owners (subject to the Creamery's charge for making) of the butter made from the milk they furnished.

Apparently, from the evidence, it appears that, in their agreement with the patrons, either by express agreement or by custom, there arose a further obligation on the part of the Creamery Company to act as factor and to sell, for the patrons, the butter made each month. But it will be noticed from findings 12, 13 and 14 (which are founded on the testimony, among others, of Brown, pp. 90-81 and p. 33, and the testimony of Olson, p. 46, Leigh, p. 48, Terrill, p. 49, Clappe, p. 51, and Atkins, p. 53, and also see pp. 52, 69, 70, 72 and 73) that the agreement of the Creamery Company was that, after selling the butter, it **"would pay over and distribute to said patrons the proceeds thereof"**; that is, the contract expressly gave the patrons **the right to the proceeds** derived from the sale of their butter and provided for its being **divided among them** in proportion to the amount of butter fat in the milk furnished by them during each month and in the proportions so estab-

lished, they were the equitable and beneficial owners of the proceeds of the sale of their butter by the very terms of their agreement. The patrons of each month, being the owners in varying proportions of the butter made that month and of the proceeds thereof.

See, also, Findings 15 and 16 of the Transcript of Record, 120-121.

That the proceeds of the sale of the identical butter made from the milk of the patrons was (after deducting the price per pound for making) to be divided among and distributed to the patrons in proportion to the amount of butter fat contained in the milk of each is definitely found, as a matter of fact, by the trial court and such finding has been affirmed by the highest court of the state. That such proceeds were to be turned over proportionately to the several patrons is likewise found to have been a part of the agreement and arrangement.

Under the cases cited in our main brief as to the weight to be given here to the findings of fact, we think it is established that, under the arrangements in this particular case, the patrons were unquestionably the equitable and beneficial owners of the proceeds derived from the sale of their butter and that the relation existing between them and the Creamery Company was clearly a fiduciary one.

The fact that the milk furnished by the patrons was made into butter and then sold, does not change the fiduciary relation, nor prevent the creamery from standing in the relation of a factor to the patrons.

"A person to whom goods are consigned for sale is no less a factor because he bestows labor upon them before they are ready for sale; and this is true though the property be entirely changed, as where milk is converted into butter and cheese or where hogs are slaughtered and manufactured into meat."

Vol. 12, A. & E. Enc. of Law, 2 Ed., p. 630.

Cyc. Law & Pro., Vol. 19, p. 121.

In a very similar case to ours the Supreme Court of Illinois has held that the person who made or manufactured the

butter and cheese and sold it for a certain price per pound was a factor and not a purchaser.

First National Bank of Elgin v. Schween, 127 Ill., 573.

So also with one who made staves into barrels.

State ex rel. Thompson, 120 Mo., 12.

So also with one who slaughters hogs and sells the product.

Shaw v. Ferguson, 78 Ind., 547.

Burton v. Goodspeed, 69 Ill., 237.

Boyle v. Bank, 125 Wis., 498.

Briere v. Taylor, 126 Wis., 347.

Butterfield vs. Lathrop, 71 Penn. State, 225, cited in brief of plaintiffs in error, is not in point. All that was there held was that in that particular case, the interest of one patron could not be seized on **fieri facias** at law.

As this court held, in Union Stock Yards Bank vs. Gillespie, 137 U. S., 421, **it is because the equitable and beneficial interest of the consignors cannot be protected at law that equity takes jurisdiction**, and it is because our patrons' rights here are in the nature of an equitable or beneficial ownership that a court of equity has been asked to declare and protect those rights.

Here, by the very terms of the arrangement, the identical milk furnished by the patrons was to be made into butter for them at a certain price per pound and this same identical butter was to be sold by the factor and the proceeds thereof were to belong to and be distributed among the patrons furnishing milk during each month in proportion to the amount of butter fat in the milk furnished by each. The very method of determining their interests made it an essential part of the agreement that the butter must be made from their milk, and the agreement explicitly provided that **the proceeds** of the sale of their butter, made from their milk, **was to be apportioned** among them.

The creamery had no right to substitute other milk or

other butter. The identical milk furnished them and its product, butter, was what was to be sold and accounted for and the interest of the patrons in the proceeds was directly fixed and understood by the terms of the agreement.

This court said, in *Powder Company vs. Burkhardt*, 97 U. S., 116, that "where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is to be a bailment, and the title never vested in the manufacturer." In our case, it is the identical milk furnished by the patrons for the month that is to be made into butter, and that particular butter, made from their milk, is the butter which was to be sold (or returned to them), and it is the proceeds of that particular butter which was to belong to and be distributed, in proportion to the butter fat in their milk, among the patrons.

Whether the patrons for each month are to be treated as owners in common, or as partners in the transaction, or otherwise, is immaterial here. So, too, it is immaterial whether any particular patron could have brought replevin, trover or other legal action to protect his rights. All the patrons, during the time in controversy, are now represented by the defendants in error here.

The beneficial and equitable ownership of the proceeds of the butter for each month was clearly, by the very terms of the agreement, in the patrons; of all of which the bank had full notice, and a court of equity will protect this beneficial or equitable ownership of the funds and prevent the bank and its receiver from taking them and applying them on the Creamery Company's overdraft.

II.

Counsel for Plaintiffs in error make much in their brief of the claim that the bank, in so far as it was connected with the operation of the creamery, was acting *ultra vires*.

It is probably unnecessary for this court to decide that question.

It does not matter whether the Jennes were running the Creamery business as a partnership or whether the Jenne Creamery Company was running it as an independent corporation or whether the bank was running it through its officers and in its own interest.

In each and every case, under the arrangement between those running the creamery and the patrons, the patrons were **the beneficial and equitable owners of the proceeds** received from the sale of their butter and in no case would the bank or its receiver have the right to take these **trust funds** of the patrons and apply them to the discharge of the Creamery Company's overdraft at the bank. That is the law as laid down in this court in *Union Stock Yards Bank v. Gillespie*, and *National Bank v. Insurance Company*.

The evidence of the bank's connection with the operation of the Jenne Creamery Company and of the acts, not only of its officers but of its directors in meeting assembled, was offered primarily **to charge the bank with that notice and knowledge** of the **trust** nature of the funds and of the patrons' equitable and beneficial ownership thereof. This was done because under the rule established by this court in the cases last cited, it is necessary to show notice to the bank, or knowledge of the bank, that the beneficial ownership was in other parties than the creamery company.

Lest we overlook the exact point in controversy, we call attention to the fact that after the bank closed, a large number of checks from the proceeds of the sale of butter came directly into the receiver's hands.

Finding 18, Transcript 121.

The other funds from the proceeds of November and October butter came in the form of checks shortly before the bank closed, and these checks or their proceeds likewise came into the receiver's hands, so that he received, in addition to the assets of the bank, these payments for our butter.

See Findings 19, 20, 21, 22, 23, Transcript, pp. 121-124.

The Creamery Company was largely overdrawn on the

bank books for some considerable time prior to the closing of the bank, and **the claim of the bank and its receiver is to hold the proceeds of these checks given in payment of our butter, and to credit them up against the Creamery Company's overdraft.**

The controversy here, then, is over the claim of the bank and its receiver to take our money, which they have in their hands, and which came from the sale of our butter, and to apply it to the payment of the overdrafts of the Creamery Company, when, in truth and in fact, our clients were and are the **beneficial and equitable owners of said funds** and the bank and its receiver had full **notice and knowledge** thereof.

In other words, we are not asking to receive any of the assets of the bank, nor are we asking any preference. All we have asked and all the courts have given us is the right to have our own,—to receive the funds which the receiver holds and of which we are the beneficial and equitable owners,—and to prevent the receiver from attempting to hold those funds of ours under a claim that he has the right to use them to pay the old overdrafts or notes of the Jenne Creamery Company. This relief, we believe, we are entitled to have under the authorities.

Under the cases cited in our main brief, we believe the bank was acting within its power in what it did through its officers in managing the Creamery Company. That is, its acts were legal, though, in the particular instance, they may have resulted unfortunately for the bank. In discussing this question there is no occasion for making mountains out of mole-hills. On page 44 of their brief, counsel make much of the fact that the receiving stations were in two different counties. A glance at a map would show that the city of Berlin itself is located partly in two counties and the receiving stations were in the same two counties, not far from the city of Berlin, the butter being made at the Springlake Creamery on the Wau-shara county side of the line.

Much is attempted to be made, by counsel for the plaintiffs in error, of the participation by the patrons in what, coun-

sel are pleased to term, the unlawful and **ultra vires** acts of the bank.

It seems sufficient answer to all that to say that the fact that the officials of the bank were acting for the bank and that the bank was in reality running the creamery company **was not communicated by the bank or its officers to the patrons, nor was it made public.**

On the other hand, the bank's officers falsely represented to the patrons that Brown, Stedman and Foster were individually interested in the Jenne Creamery Company and that statement was **"believed by the patrons to be a true statement of the conditions of affairs until after the failure of the bank."**

Findings 31 and 32, Transcript, p. 128.

This would seem to be a sufficient showing to refute any idea that the patrons countenanced or participated in any unlawful act, if there was such, on the part of the bank, and there was nothing in the form of the transaction, known to the patrons, to make them suspect that the information conveyed to them and on which they relied, was untrue.

In other words, there is not, in this case, a single thing which should estop or prevent the patrons and their assignees from establishing their equitable and beneficial ownership of the fund.

The equities are all in their favor and the only question here is whether their beneficial and equitable ownership shall be recognized and protected. There is no question of diminishing the assets of the bank in order to protect them. The funds which the patrons and their assignees ask to have returned to them are the identical funds of which they are, under the arrangement, the beneficial and equitable owners, and they are the identical funds which have been actually traced and found to now be in the hands of the receiver. Such funds, the receiver claims, wrongfully, we believe, to be able to hold against us, and to apply them as payment of the old overdrafts and notes of the Jenne Creamery Company. This, we believe, he has no right to do. They are not assets of the bank. They

are partly our funds which came into his hands since the bank failed and the other part are our funds which were in the bank at the time it failed. To direct him to pay over the money which belongs to us, and which he wrongfully claims, does not impair or affect the assets of the bank at all.

If, as we think, it was and is unnecessary to pass upon the question of whether or not the acts of the bank in connection with the operation of the Creamery Company were **ultra vires**, then there is no federal question in this case.

The decision below, not being placed upon, nor involving, the federal question (**ultra vires** acts of bank) sought to be raised here, is binding here. It was decided below upon questions of general law. Upon those questions the lower court's decision is binding here.

Corbett v. Craven, No. 31, Oct., 1909, Calendar, U.S.S.C.

Respectfully submitted,

J. C. THOMPSON,

Solicitor for Defendants in Error.

MR. E. F. KILEEN,

Of Counsel.

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Counsel for Parties.

RANKIN, RECEIVER OF THE BERLIN
NATIONAL BANK, v. EMIGH.¹ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.

No. 144. Argued April 15, 18, 1910.—Decided May 31, 1910.

On error to a state court of last resort in a case involving the liability of a national bank under a contract, the findings of fact of the state court are binding on this court, and only the Federal question as to the effect of the facts found can be passed on.

Although restitution of property obtained under a contract which is illegal because *ultra vires*, cannot be adjudged by force of the illegal contract, the courts will compel restitution of property of another obtained without authority of law; and, although the contract under which a national bank obtains money from an innocent third party may be *ultra vires* under Rev. Stat., §§ 5133-5136, the bank may be required to return the money so received to the party entitled thereto. *Citizens' Central National Bank v. Appleton, Receiver*, 216 U. S. 196.

In this case, even if the purchase and carrying on of a mercantile company by a national bank was illegal, the persons dealing with the mercantile company were entitled to receive the money paid into the bank for their account.

134 Wisconsin, 565, affirmed.

THE facts, which involve the liability of a national bank under a contract claimed by the receiver to be *ultra vires*, are stated in the opinion.

Mr. Rufus S. Simmons, with whom *Mr. Frank J. R. Mitchell* and *Mr. S. C. Irving* were on the brief, for plaintiffs in error.

Mr. J. C. Thompson, with whom *Mr. E. F. Kileen* was on the brief, for defendants in error.

¹ Original docket title *Earling, Receiver, &c. v. Emigh*.

MR. JUSTICE WHITE delivered the opinion of the court.

To reverse a judgment of the Supreme Court of Wisconsin (134 Wisconsin, 565), affirming a judgment of the Circuit Court of Green Lake County, this writ of error is prosecuted.

The Berlin National Bank, doing business in the city of Berlin, Green Lake County, Wisconsin, being insolvent, its doors were closed by the Comptroller of the Currency on November 17, 1904. P. R. Earling was subsequently appointed and qualified as receiver. On November 27, 1906, John Emigh and O. L. Atkins, as assignees of a large number of persons, commenced this action in the state court against the receiver and the bank. It was, in substance, averred that large quantities of milk had been furnished by the assignors of the plaintiffs to a creamery known as the Jenne Creamery Company, under agreements that all the milk supplied should be converted into butter, the butter sold, and the proceeds, less a sum agreed upon as a compensation for the services rendered, should be divided *pro rata* among those furnishing the milk. It was alleged that the creamery, during the period covered by the claim, was, in fact, owned by and had been operated by the bank, and that when the doors of the bank were closed there were outstanding unpaid checks for about \$400, for collections made for account of those who had supplied milk between April and September, 1904, and that a large amount had been collected and not paid over for the proceeds of butter made from milk furnished during October and the first half of November, 1904. The prayer was that plaintiffs recover from the receiver such portion of the collections as had come into the hands of the receiver, and as to the proceeds which had been diverted by the bank, that plaintiffs be recognized as general creditors, entitled to participate *pro rata* in the

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distribution of the assets of the bank. The defendants separately answered, and, except as to the allegations regarding the incorporation of the bank, its insolvency and the appointment of a receiver, took issue upon the averments of the complaint.

The cause was tried by the court. The facts, as found, are thus summarized:

For some time prior to October 1, 1902, the Jenne Creamery Company, a Wisconsin corporation, having its principal place of business in the city of Berlin, carried on the business of making butter and other dairy products with milk furnished by patrons in Green Lake and other counties. The corporation for these purposes, besides operating its plant at Berlin, leased various other creamery plants in the vicinity. At one time the business was carried on by a firm known as D. J. Jenne & Company, and after the organization of the Jenne Creamery Company the creamery business was solely carried on by that corporation, the members of the firm of Jenne & Company, however, owning all the stock of the creamery company. The milk which the company separated was furnished by numerous producers under agreements by which, for a stated compensation, the creamery company agreed to make all the milk it received into butter, to sell the same, collect the proceeds, and to divide them *pro rata* among the milk owners less the compensation agreed upon. The business did not prosper. On October 1, 1902, there were outstanding unpaid checks of the company, drawn on the Berlin bank in favor of milk producers, to the extent of about \$8,000, there being no funds on hand to the credit of the creamery company in the bank available to pay the checks. On the same date one of the firm of D. J. Jenne & Company owed the bank \$2,200, which was unsecured, and besides was indebted to other creditors for at least \$2,600. The firm of D. J. Jenne & Company also owed the bank \$5,000. Evidently in contemplation

of securing the payment of these various debts and to prevent the loss which would be occasioned by the bankruptcy of the creamery company, and upon the expectation that the situation might be relieved by carrying on the business under a new management, an arrangement was made between the Jennes and the Berlin bank. By this arrangement the entire stock of the creamery was assigned to Brown, the cashier of the bank, and two other officers of the bank, who, while thus becoming in form the owners of the stock, really held it for account of the bank. The property of the partnership of Jenne & Company and the property of the individual members of the firm was transferred to Brown. In order to bring about these transfers the bank agreed to pay the outstanding checks drawn against it by the creamery company in favor of milk producers. Under the arrangement the business continued to be carried on in the name of the Jenne Creamery Company, although from the facts which we have just stated it is apparent, as said by the Supreme Court of Wisconsin, "that the use of Brown's name was only formal, and that the continuance in form of the corporation was only for convenience of bookkeeping and dealing with the patrons." Brown acted as manager of the business apparently for the creamery company, signing and endorsing checks in the name of that corporation as such manager, etc.

The producers of milk were not parties to the transfer made by the Jennes to the bank. No formal notification to them was given of the fact that the bank in effect owned the stock of the corporation and was virtually carrying on the business, no new contracts were made with them in the name of the bank as the owner of the creamery, but, so far as they were concerned, the affairs of the creamery company were, in form, conducted as they had been previously carried on, the producers continuing without interruption to furnish their milk as they

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had been in the habit of doing under the agreements previously made.

The operation of the business after the transfer was not profitable. The bank realized a few thousand dollars from the sale of the individual property of Jenne, but when the bank ceased to do business, in November, 1904, the account of the creamery company was apparently exhausted, and the bank had not recouped itself for the payments made of the \$8,000 of checks outstanding in October, 1902. Besides, when the bank failed there was outstanding checks for \$406.97, issued between April and October, 1904, and no settlement had been made with those who had supplied milk during the month of October and part of November, 1904, prior to the suspension of the bank. Referring to the proceeds of the butter made from the milk delivered by the patrons of the creamery during October and November, 1904, the trial court, as stated by the Supreme Court of Wisconsin, found "that bank drafts had been received into the bank for such butter. Such drafts ran to the Jenne Creamery Company, and were endorsed by Brown, the cashier, and mingled with other moneys of the bank. The total amount was \$2,520.46. It was found by the court, upon careful analysis of the accounts, that at all times after the receipt of any of said drafts the bank had on hand an amount of money and cash items exceeding said total, and such an amount was turned over to the receiver upon his taking possession. It also traced a considerable share of said drafts into the hands of the bank's correspondents at other cities, by which they had been collected and credited to the bank, and in each case it was found that there remained a credit account with that correspondent larger than the amount of such drafts sent to and collected by it, which credit balance was turned over to the receiver after his appointment."

Upon the facts by it found the trial court adjudged that

\$2,520.46 should be paid to the plaintiffs out of the funds in the hands of the receiver, and that as to the sum of the outstanding checks given for the proceeds of butter sold prior to October, 1904, the plaintiffs were entitled to participate *pro rata* with the other general creditors in the distribution of the assets of the bank. As already stated, the Supreme Court of Wisconsin affirmed the judgment.

The Federal question relied on is in substance that the Berlin bank, as a national bank, had no power to operate a creamery, and could not, therefore, lawfully incur liability on account of such operation, and hence the judgment of the state court is repugnant to the following sections of the Revised Statutes: 5133 and 5136, which prohibit a national banking association from doing other than a banking business; 5134 and 5190, which prohibit such an association from transacting the business of a bank in any other place than where its banking house is located and that specified in its organization certificate; 5145, which requires the affairs of such association to be managed by not less than five directors; and 5236 and 5242, which require ratable dividends and prohibit all transfers with a view to preference. It is true that there are other assignments of alleged error, but we put them at once out of view, as they in substance but assert that the court below erred in affirming the judgment of the trial court because certain of the facts found were not sustained by the evidence, contentions which are not open to our inquiry, as it is elementary that on error to a state court of last resort in a case of this character the findings of fact of the state court are binding on us.

The trial court found, as a fact, that after the transfer of the creamery property in October, 1902, some of the patrons were informed that the officers and directors of the bank were individually interested in the creamery, but that they were acting for the bank was not made

known, and it was also represented to such patrons that the creamery was in better condition than ever before, and such was generally believed by the patrons to be a true statement of the condition of affairs until after the failure of the defendant bank. The Supreme Court, however, evidently, did not consider these circumstances material. It held that whatever the form of the transaction, the Berlin bank acquired the creamery property from the Jenne Creamery Company in October, 1902, that it operated the same thereafter until the bank ceased doing business, that it "took the milk furnished by the patrons, made the same into butter and sold it and collected the proceeds;" and that by virtue of the agreements under which the milk was furnished the proceeds of the sale of butter "belonged to the patrons and was received by the bank for them and under a duty to pay it to them." It also decided that when the bank failed on demand to pay over the collections for the butter sold prior to October, 1904, represented by outstanding checks, an indebtedness to the owners of the money arose. From the facts as found by the trial court the Supreme Court concluded that the receiver had received, in actual money, or in credits with correspondents, the \$2,520.46 belonging to the patrons collected for the butter made from the milk supplied in October and November, 1904, and that the receiver did not receive such sum as moneys of the bank upon any trust to distribute to the creditors of the bank, but held it as trustee for the owners. In declining to consider whether, as contended, it was beyond the power of the bank to engage in the creamery business, the court said:

"No authority has been cited, and we think none can be, to deny the power of a banking corporation, or any other corporation, to disgorge property of another which it had got into its possession by any means whatever under a duty to disgorge. It may have had no legal

general creditors of the bank to the extent only that their property had been received and appropriated by the bank.

Affirmed.